



**Transaftric Timber Limited v Kenya Forest Service & 2 others (Constitutional Petition E003 of 2024) [2024] KEHC 9177 (KLR) (Election Petitions) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9177 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
ELECTION PETITIONS  
CONSTITUTIONAL PETITION E003 OF 2024**

**CM KARIUKI, J  
JULY 31, 2024**

**BETWEEN**

**TRANSAFTRIC TIMBER LIMITED ..... PETITIONER**

**AND**

**KENYA FOREST SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF CONSERVATOR OF FOREST ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. In a petition dated 1 November 2023. The Petition seeks the prayers.
  - I. A declaration that the action of the 1<sup>st</sup> and seco<sup>nd</sup> respondents of detaining Motor vehicle KBW 334 Y (Mercedes Actros) and Trailer Number ZC 9206 have out rightly violated the rights of the Petitioner under Articles 20 21 22(I) 23 (I) 24 (I) and (3), 28 31 (b), 39 (I), 40 (1), (2) and (3), 47, 48 of *the Constitution* of Kenya.
  - II. A declaration that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are illegal, an abuse of office, unfair, and in violation of the Petitioner's rights.
  - III. An order was made directing the first and second Respondents to release the Petitioner's Motor Vehicle registration number KBW 334 Y (Mercedes Actros) and Trailer Number ZC 9206.
  - IV. A declaration that the actions of the 2<sup>nd</sup> Respondent are in breach of chapter 6 of *the constitution* and, hence, unfit to hold public office anywhere in Kenya.
  - V. A declaration that the 1<sup>st</sup> and seco<sup>nd</sup> respondents have abdicated their constitutional and legal roles and thereby occasioned undue infringement of the Petitioner's rights



- VI. Damages for loss of User for the period in which the subject motor vehicle and Trailer continue to be detained, calculated at Kshs. 80,000/= a day plus interest.
- VII. General damages for infringement of the Petitioner's constitutional rights.
- VIII. Costs of this Petition
- IX. Such other order (s) as this honorable court may deem.
2. The Petition case is stated in the facts in the Petition as follows: That motor vehicle KBW 334Y (Mercedes Actros) Trailer Number ZC 9206 belonging to the Petitioner herein was on 16 September 2023 unlawfully impounded on and detained by officials of the 1<sup>st</sup> Respondent at Geta Forest, Nyandarua County. That the 1<sup>st</sup> Respondent neither gave reasons for the said detention despite the Petitioner's requests nor had they preferred any charges against the Petitioner in a Court of Law to justify such detention.
3. To date, the said Motor vehicles are not subject to any criminal investigations and court proceedings as the fir<sup>st</sup> and seco<sup>nd</sup> respondents have not preferred any charges in connection with the subject motor vehicles and against the Petitioner; thus, no sufficient reason exists for the fir<sup>st</sup> and seco<sup>nd</sup> respondents to continue detaining the said motor vehicle and Trailer.
4. That on 25 October 2023, the Petitioner received internal information from a Security Committee of the 1<sup>st</sup> Respondent, which letter was directed to the 2<sup>nd</sup> Respondent clearly outlining that no reason exists for the subject motor vehicle and Trailer to be detained and thus advised that the same be released to the Petitioner. However, officials of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have continued to unlawfully detain the Petitioner's Motor vehicle and Trailer, indicating that they are purposefully frustrating the Petitioner for no justifiable or legal reason.
5. That Petitioner's constitutional right to own and enjoy quiet possession of property continues to be violated by the Respondent's agents and officials as the said vehicle and Trailer are wasting away, which vehicle and Trailer are the Petitioner's source of livelihood. The Petitioner continues to lose income from projects it was contracted to undertake using the subject motor vehicle and Trailer while they continue to remain detained. That Petitioner is in distress as it continues to lose income, considering the motor vehicle and Trailer had been subcontracted by various companies for its transport services and, as a result of the Respondent's unjustifiable actions, has lost and continues to lose business opportunities and income.
6. The sheer illegality and unlawfulness by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have infringed on the Petitioner's right to own and enjoy quiet possession of the property and undermined the Petitioner's proprietorship. It is pretty clear that the fir<sup>st</sup> and seco<sup>nd</sup> respondents are using their position in office to continue to frustrate the Petitioner (a clear abuse of office), and the Petitioner fears for the security and safety of the motor vehicle and Trailer.
7. The Petitioner has not committed any crime, and thus, the said detention of the suit motor vehicle and Trailer is and continues to be unconstitutional, illegal, and unprocedural. The same is supported by the Affidavit of Zakayo Maina Waweru sworn on 1/11/2023 in Affidavit. He reiterated that he is the Director of Transafric Timber Limited (the Petitioner herein) and thus well versed with the facts of this Petition. The Petitioner is the legal and rightful motor vehicle owner KBW 334 Y (Mercedes Actros & Trailer Number ZC 9206 and engages in the Transport and supply business. (annexed hereto and marked ZMW1 is a copy of the logbook for the said motor vehicle and Trailer)



8. The said motor vehicle and Trailer were unlawfully impounded on 16 September 2023 and detained by officials of the 1<sup>st</sup> Respondent at Geta Forest, Nyandarua County. At the time of such detention, the Petitioner was in its ordinary business, having been subcontracted by the 1<sup>st</sup> Respondent to transport utilities to the Folea Gilgil B campus, where the 1<sup>st</sup> Respondent was conducting recruitment training for its rangers. (annexed hereto and marked ZMW2 are copies of delivery notes related to the above business stamped by the 1<sup>st</sup> Respondent).
9. From the date of the detention, the Petitioner made various efforts to enquire about the reason for such impoundment by the fir<sup>st</sup> and seco<sup>nd</sup> respondents. However, neither justified reasons have been given nor has any official investigation been launched for the motor vehicle at Trailer in connection with any alleged crime and, more importantly, been charged in a Court of Law. While Petitioner continued to exhaust all diplomatic attempts to seek the release of the subject Motor Vehicle and Trailer, Petitioner received internal information via a letter from officials of the 1<sup>st</sup> Respondent on 26 October 2023, which letter was directed to the 2<sup>nd</sup> Respondent clearly outlining that Security Committee of the 1<sup>st</sup> Respondent recommended that no reason exists for the subject motor vehicle and Trailer to be detained and thus advised that the same be released to the Petitioner (Annexed hereto and marked ZMW3 is a copy of the said letter from the Regional forest Conservator Nyandarua County).
10. That, however, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued to unlawfully detain the Petitioner's motor vehicle and Trailer, a clear indication that they were purposefully frustrating the Petitioner for no justifiable or legal reason (annexed hereto and marked ZMW4 is a copy of a demand letter addressed to the office of the 2<sup>nd</sup> Respondent herein which has been left unanswered to date). It has now been well 45 days since the said vehicle was unlawfully impounded and detained, and there was no and continues to be no justifiable cause and reason for the officials of the 1<sup>st</sup> Respondent, with authority from the 2<sup>nd</sup> Respondent, to continue to detain the said vehicle.
11. Petitioner's constitutional right to own and enjoy quiet possession of property continued to be violated by the Respondents as the said motor vehicle and Trailer, a commercial vehicle, were being wasted away. The Petitioner continues to lose income from projects the said vehicle was contracted to undertake. In contrast, the car remained and continued to stay detained (annexed and marked ZMW5 are copies of transport and supply agreements detailing the amount the subject motor vehicle and Trailer were raking in per day as well as LPOs from companies that had contracted the Petitioner for its services using the subject motor vehicle and Trailer).
12. That Petitioner is in distress considering the subject Motor Vehicle and Trailer had been subcontracted by various companies for its transport services during the period of detention and, as a result of the fir<sup>st</sup> and seco<sup>nd</sup> respondents' unjustifiable actions, had lost and continued to lose business opportunities and income. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent acted out of malice, which caused the Petitioner immensely. The sheer illegality, abuse of office, and unlawfulness by the fir<sup>st</sup> and second respondents infringed on the Petitioner's rights to own and enjoy quiet possession of the property and undermined the Petitioner's proprietorship.
13. It is pretty clear that the fir<sup>st</sup> and second respondents were using their position in office (a clear abuse of office) to continue to frustrate the Petitioner, and the Petitioner feared for the security and safety of the motor vehicle and Trailer as well as the immense losses the business for the Petitioner had incurred and continued to incur. In this regard, it averred that the respondents ruthlessly infringed and undermined the property rights of the Petitioner, and the court ought to issue the orders sought in the Petition.
14. The Petitioner side pw1 testified, reiterating what is deponed in his Affidavit as set above as the defense/ respondent called one witness, DW1 one is John Maina Njoroge, conservator in charge of county



Nyandarua on the docket on forestry. He had sworn on an Affidavit, which he urged the court to consider as his testimony as he relied on. The Affidavit was sworn in on 26/3/2024.

15. He reiterated that, according to the Forestry Management Act, some stipulations lay down conditions for the entry and harvesting of forestry products; there are procedures for procurement of the same process and agreement provisions under the Public Procurement and Management Acts. If the Petitioner had authorization as required by law, he did not show the same to the court, as seen in paragraph 2 of the Dw1 Affidavit. Pw1 was an employee of the Kenya Forest Service; he knew all the procedures. GN 2891 On 6/3/2023 Petitioner was appointed member of the Director of Kenya Forest Service for three years.
16. Thus, Dw1 testified that Petitioner could not conduct business with Kenya Forest Service due to a conflict of interest bar. He testified that the Respondent disowned the annexures attached. There was no violation of Petitioner's rights, and I pray that Petition be dismissed.
17. On Cross-examination by Ms Mwai, he stated that the letter seeking approval for the release of the m/v did not clear the Petitioner of violating the requisite procedures and that he was only advising regardless of illegality. He urged the conclusion of the case. He said the Chief Conservator delegated authority to him. He knew that there was a principle of fairness.
18. He went ahead to State; they were dealing with a staff (Petitioner). He is entitled to fair Administrative processes. The line of dealing with staff was Administrative. Zakayo Maina, Director of Petitioner, is one whom he referred to as Director. He confirmed that an internal investigation had been conducted, though he was not the investigator. He mentioned that Section 60-70 of the Procurement Act sets the law straight on tender. He stated that, on the letter attached by the Petitioner, he noted that the same was illegally acquired and that he was unaware of the same letter of 25/10/2023.
19. Although the DW1 mentioned an affidavit in which he purportedly swore, the same was not found in the court record, so the court can only deal with what he stated on oath. Further, the court did not see any submissions by either party despite the court giving the directions for the parties to file and exchange the same.

### **Issues Analysis And Determination**

20. Essentially, the Petitioner's case is founded on the rights to property under Article 40 of the Constitution of Kenya based on the illegal detention of Motor vehicle KBW 334 Y (Mercedes Actros) and Trailer Number ZC 9206. Thus, the issue is whether the detention violated the Petitioner's rights to property.
  - a. If the violation is established by fact and testimony herein, did Petitioner suffer loss and damage and thus be entitled to ;
  - b. Damages for loss of User for the period in which the subject motor vehicle and Trailer continue to be detained, calculated at Kshs. 80,000/= a day plus interest.
  - c. General damages for infringement of the Petitioner's constitutional rights.
  - d. Plus, costs
21. Article 40 COK,2010; Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--  
of any description and
  - (b) in any part of Kenya.



- (2) Parliament shall not enact a law that permits the State or any person-- to arbitrarily deprive a person of property of any description or any interest in, or right over, any property of any description; or
  - (b) to limit or in any way restrict the enjoyment of any right under this Article based on any of the grounds specified or contemplated in Article 27 (4).
  - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-- results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, by Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out by this Constitution and any Act of Parliament that-- requires prompt payment in full of just compensation to the person and
  - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
  - (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
  - (5) The State shall support, promote, and protect the intellectual property rights of the people of Kenya.
  - (6) The rights under this Article do not extend to any property found to have been unlawfully acquired.
22. The standard of proof in cases is the legal standard to which a party who holds the burden of proof must prove their case. Mativo J, in the above case, stated that the standard of evidence determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases such as the present one, the standard of proof is the balance of probabilities. Justice Mativo cited with approved Lord Denning in *Miller v Minister of Pensions* [1942] 2 ALL ER 372 as follows:
- “The .....(standard of proof).....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say 'we think it more probable than not,' the burden is discharged, but if the probabilities are equal, it is not.”
23. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of a fact that he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who fails if no evidence was given on either side; see also (Section 107 of the [Evidence Act](#)).
24. In the instant case, the Respondent does not deny the detention of the subject motor vehicle but attempts to justify the act while invoking some unsubstantiated allegations. The Respondent relied on an affidavit purportedly sworn on 26 March 2024; however, the same is nowhere on the court's record. The parties were directed to file submissions but still need to comply.
25. The Dw1 belatedly attempted to disown his letter dated 25 October 2023, in which he sought approval of releasing the lorry subject herein, after which it was released. When the Petitioner's letter of 30 October was issued to demand the release of the same m/v, the respondents did not deny liability or claim, but the m/v was released later unconditionally.



26. No attempt was made to justify detention under the provisions of *the constitution* cited on violation of property rights. Thus, the court finds that the detention of the m/v was unjustified and, therefore, the breach of Petitioner's right to property was committed. The provisions of article 47 COK,2010 were not complied with as no reason for the decision to detain the subject herein was ever furnished to the Petitioner. Article 23 (3) COK,2010 (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-- a declaration of rights;
- (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a proper or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation and
  - (f) an order of judicial review.
27. *The Constitution* and various judicial precedents guide the award of damages for violating constitutional rights. The High Court has jurisdiction to grant reliefs under Art 23(3) COK,2010; thus, the remedies established in the Petition, which commend themselves in the circumstances, are in the nature of declarations of violation of the rights stated above.
28. Also, the entitlement of damages but the formal assessment will be done in the subordinate Court via a civil suit as by the time of the hearing of the Petition, the pleadings were not amended to establish the date of release of the m/v nor were the damages particularized for the loss of User as required in the pleadings.
29. The subordinate Court shall be guided by the principles that Special damages are awarded to compensate a claimant for actual out-of-pocket expenses and provable losses that have been incurred as a direct result of the defendant's actions or behaviour. Special damages are amenable to precise monetary quantification, and as such, the claimant must be able to support their claim with compelling and accurate evidence of the losses sustained.
30. In *Equity Bank Limited v Gerald Wang'ombe Thuni* (2015) eKLR, the Court highlighted the importance of special damages being specifically pleaded and thereafter strictly proved before they can be awarded. This position was further buttressed by the Court in *Okulu Gondi v South Nyanza Sugar Company Limited* (2018) eKLR, where it was held that "special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity.
31. On general damages or non-pecuniary losses, the same are those damages that cannot be mathematically assessed at the trial date. These damages are not amenable to precise monetary quantification and are assessed by the Court, ordinarily guided by precedents of a similar nature.
32. The court, therefore, issues declaratory reliefs and directs the Petitioner to lodge suit in subordinate court for the assessment of damages suffered by the Petitioner courtesy of the unconstitutional detention of the subject herein. Thus, the orders herein befitting the above findings are;
- i. A declaration be and is at this moment issued to the effect that the action of the 1<sup>st</sup> and seco<sup>nd</sup> respondents of detaining Motor vehicle KBW 334 Y (Mercedes Actros) and Trailer Number ZC 9206 have out rightly violated the rights of the Petitioner under 40 (1), (2) and (3), and 47, of *the Constitution* of Kenya.



- ii. Petitioner is entitled to damages for loss of User to be assessed by the subordinate court for the period in which the subject motor vehicle and Trailer were detained, calculated from the date of detention to the date of release of the m/v subject herein.
- iii. The Petitioner is entitled to general damages to be assessed by the subordinate court for unlawful detention of the m/v subject.
- iv. Costs of this Petition

**JUDGMENT DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 31<sup>ST</sup> DAY OF JULY 2024**

.....

**CHARLES KARIUKI**

**JUDGE**

