



REPUBLIC OF KENYA



**Rising Rays Investments Limited v Kenya Revenue Authority (Petition
E003 of 2022) [2024] KEHC 17229 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
PETITION E003 OF 2022
TM MATHEKA, J
AUGUST 20, 2024**

BETWEEN

RISING RAYS INVESTMENTS LIMITED PETITIONER

AND

KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

1. The petitioner is a body corporate duly registered company under the [Companies Act](#) 2015, practicing in the business of construction in the Republic of Kenya.
2. The respondent is a body corporate established by an Act of Parliament Cap 469 Laws of Kenya charged with collecting revenue on behalf of Government of Kenya.
3. The petitioner seeks from this court three declarations that, it's right of not having its property seized arbitrarily as guaranteed under Article 31(b) of [the Constitution](#) has been violated and infringed by the respondent; its right to acquire property of any description and in any part of Kenya as per Article 40(b) of [the constitution](#) has been infringed and/or violated by the respondent, that the seizure by the respondent of its motor vehicle without its consent, without any notice is contrary to Section 44 (1) of the [Tax Procedures Act](#) 2015, and Constitution of Kenya 2010 .
4. The petitioner also seeks an order of restitution of its motor vehicle and prohibitory order to respondent from seizing /detaining it without following the due process of the law .
5. The petitioner seeks damages for illegal seizure and detention of its motor vehicle leading to loss of business amounting to Kshs. 2,605,000 as per the attached statement of loss of business income plus costs and interest.
6. The petition is supported by the affidavit of Jeremiah Muange Musyoka (Muange) sworn on 21/9/2022 .



7. He depones that he was at all material times a director and shareholder of the petitioner whose authority he has to swear the affidavit. That he is also the registered owner of motor vehicle reg no. KAG 411U - which was purchased for the purpose and use by petitioner for the day to day works and supervision of the operations of the works of excavators registered as KHMA 233G, KHMA123G.
8. That vide a letter dated 15/9/2021 ref KRA/05/1011/30/Vol.138/146 he received a summons signed by one Purity K. Nkiiri for officer in charge DCI KRA Unit, to appear before them in offices at CBC building Wing D 6th FL, along Elgon Road Upper Hill - on account that the office was investigating a case of "being in possession of unaccustomed goods to wit are motor vehicle reg no. KAG 411U".
The letter indicated that the author had reason to believe expressed thus; "you are either connected to the offence or you can provide information that will provide information that will assist us in our investigation."
9. The letter further stated that the summons were under section 52 (1) of the National Police Service Act, 2011, and in default of honouring the summons he was liable to prosecution under Section 52(2) of the same Act - he was directed to carry with him the relevant papers.
10. He depones further that he responded to the summons with the relevant papers - the log book which is annexed to the affidavit.
11. That the motor vehicle was detained and had not been returned to him despite demand through his advocate.
12. He depones further that he was not been charged with any offence - and because the motor vehicle was for use by the petitioner for the purposes of carrying out its work - he was forced to hire a motor vehicle KBP 368W for the period of that work occasioning the petitioner loss damage - the certificate of incorporation for the petitioner, the log book for the motor vehicle, the contract for hiring the said motor vehicle are all annexed to his affidavit.
13. Annexed also is the demand letter from his counsel to DCI KRA Unit dated 18/11/2021 ref AM11C/J/80/2021; and the report detailing the loss of income by the petitioner.
14. There is a replying affidavit sworn by No. 235509 C.I Purity Kawira, a police officer at DCI seconded to Investigations ; enforcement Department of Kenya Revenue Authority - on 6/12/2022.
15. According to C.I Kawira - it is true that the motor vehicle was found to be unaccustomed goods, and the Director of Public Prosecution advised to charge the Jeremiah Muange Musyoka with a criminal offence.
16. She depones that the motor vehicle was intercepted on 5/9/2020 by DCI Officer Makueni while on normal patrol - he said Jeremiah Muange Musyoka (Muange) told police that he had purchased the motor vehicle from one Swabir Mbarak Salmin – the officers at Makueni booked the motor vehicle and report vide OB 40/5/5/2020 awaiting motor vehicle Chassis & Engine Numbers Verification.
17. That the motor vehicle was found to have two chassis numbers HZJ75 – 0028796 on the chassis block & JTELV73J607015066 as per the descriptive plate.
18. That Muange did present himself to record statement on 6/5/2020 and produced - copy of original logbook - details of chassis were HZJ75 - 0028796 - land cruiser in his name; he produced a receipt no. 0577 dated 11/2/2018 detailing purchase of spare parts, in Dubai & a copy of the old model log book - all annexed to the affidavit.



19. She depones further that on 12/5/2021 investigations were handed over to DCI –KRA by DCI Makueni .
20. Upon containing the company in Dubai over the receipt that Muange had surrendered - the company by name Al Aneeq confirmed the sale of the spare parts in the receipts which included a gear box, Axle clutch, dash board, radiator & condenser – there was no chassis - there was no chassis or engine - and they said just that - vide the annexed email dated 11/9/2021 - that they had not sold a chassis or an engine to Muange.
21. That further information was obtained form NTSA - TIMS on the two chassis numbers - HZJ75 – 0028796 engine no 0171183 Toyota Landcruiser - beige in color Reg KAG 411U - in the name Jeremiah Muange Musyoka and Bashy Africa Credit ltd; while no JTELV73J 607015066 was found to relate to engine no. IVD -0397031 Toyota Land Cruiser GKB 8425 belonging to Kenya Police. (both NTSA – TIMs report are annexed)
22. It is deponed further that a search at KRA Automated Customs Management Systems ACMS provide no corresponding customs entry for the subject motor vehicle - hence the conclusion that the motor vehicle was not imported in accordance with the customs law & procedure - in which event then - Section 2 of the East Africa Community Customs Management Act which defines unaccustomed goods as dutiable goods or which duties due have not been paid.
23. That on 4/4/2022 the file was forwarded to DPP for perusal and decision to charge or otherwise and on 17/10/22 the DPP decided that sufficient evidence existed to charge the petitioner with “Being in possession of a suspected stolen motor vehicle Contrary to Section 323 of the Penal Code as read with Section 36 of the same Act”(The letter is annexed)
24. Further, that the seizure and detention of the motor vehicle was anchored in Section 210 (c) & section 213 of EACCMA which she cites - to the effect that under Section 213 (4) the police are empowered to detain the thing seized in their custody pending the completion of proceedings or until it is decided that no proceedings shall be instituted. That should the petition be allowed - it will stand in the way of the prosecution of the suspect.
25. It is deponed further that the right to property is not absolute - and does not extend to property unlawfully obtained.
26. It is sought that the petition be dismissed for being misconceived and only intended to frustrate the respondent in the discharge of its statutory mandate.
27. Jeremiah Muange Musyoka filed a supplementary affidavit - Sworn on 22/5/2022 to the effect that he purchased a complete Land Cruiser Cabin on 13/2/2018 in Dubai from Al Aneeq Cars& Spare parts LLC & annexed the copy of the tax invoice) That what he bought was white but he painted it beige to correspond to log book details he annexed photographs - he said he tried getting in touch with the shipping company that shipped it together with other goods in vain. The receipt no. 000523 dated 13/2/2018 shows he purchased Cabin Land Cruiser with back body, F/R Axle, Arm Rest Prado, Dashboard, Steering.
28. Parties filed written submissions which I have considered.
29. For the petitioner it is submitted that his motor vehicle was seized on 5/5/2020, he was summoned by DCI on 15/9/2021 - and in the meantime he had to find an alternative though at a cost to run the affairs of the petitioner. That no criminal charges were pressed against the petitioner. That contrary to Article 50(2) (e) of the Constitution the respondent has not offered any explanation for the delay in any prosecution That the chassis no. for the petitioner’s motor vehicle is HZJ75 – 0028796 and



not JTELV73J60715066. That it is only after the respondent was served with the petition that they took action - that under Article 259(8) of *the Constitution* they had an obligation to act without unreasonable delay and referred to Charo Karisa Salim v R Court of Appeal MSA [2016] eKLR as cited in Misc Cr. Application no. 43/2019 - that fair trial includes the right “to have the trial begin and conclude without unreasonable delay”.

30. It is further submitted that Sections 44 (1) & (2), 60(1) – (3) of the *Tax Procedures Act*, 2015 which allows the respondent to unilaterally & arbitrarily exercise the power, search and forfeiture of goods – are unconstitutional and having done so with respect to the petitioner, motor vehicle reg no. KAG 411U renders the respondent liable to paying compensation in form of damages.
31. Citing Robert K. Ayasi v Kenya Revenue [2018]eKLR the counsel for the petitioner submits that in that case the court awarded Kshs. 2,000,000 compensation for damages arising from the breach of four constitutional rights – where the High Court pronounced that Section 44(1) & (2), of the *Tax Procedures Act* were unconstitutional.
32. It is further submitted that the respondent continues to hold the petitioner’s motor vehicle - causing it to be in deplorable state / be in a state of decay due to the unlawful acts of the respondent. The court is urged to grant the prayer for damages at Kshs. 2,605,000.
33. In response the respondent filed submissions in which the contents of the C.I Kawira’s affidavit were reiterated. The respondent set out the following issues for determination whether ; the petitioner has locus standi to institute the suit, the petitioner’s rights under Article 31(b) and 40(3) of *the constitution* were violated and whether the petitioner is entitled to the relief sought.
34. On the locus issue it is urged that locus standi is the right to be heard or the right to bring on action. It is submitted the subject motor vehicle is registered in the name of Jeremiah Muange Musyoka and Bashy Investment Ltd - and there is nothing before the court to show that it is registered in the name of the petitioner. That the fact that the said Muange is a Director and Shareholder of the petitioner does not confer locus upon him to bring the petition. The court was referred to Michael Osundwa Sakwa v Chief Justice & President of the Supreme Court & Another [2016] eKLR also making reference to Ms Priscilla Nyokabi Kanyua v A.G & IEBC HCCP No. 1 of 2010 – to the effect that locus standi arises from a minimal personal interest - Khalef Khalifa El- Busaidy v Commissioner of Lands & 2 others [2002]eKLR –locus will be - where the individual has a legal interest either vested/ contingent in the subject matter before court which is above that of other members of the public in general. See also BV Narayana Reddy v State of Karnataka Air (1985) Kan 99,106 (*the Constitution* of India , ARD 226)
35. On the issue of the rights under Article 31 (b) and 40(3) of *the Constitution* it is argued that the petitioner has not demonstrated how its Constitutional Rights have been infringed/violated. That Article 31(b) is about the right not to have a person’s possessions seized - that it is limited to possessions right fully and lawfully acquired by the owner of those possessions - that the respondent has demonstrated that this property was unlawfully obtained and that there has been tempering with the chassis to regularize the irregular acquisition; that Article 40(3) only applies to property lawfully obtained.
36. It is submitted further that the petitioner has not met the threshold for a Constitutional petition - which must not just cite provisions of *the Constitution* but must raise constitutional issues and violation of right under the Bill of Rights.



37. The respondent relies on *John Harun Mwau v Peter Gastrow & 3 others* [2014] eKLR for the position that a person will file a Constitutional Petitioner when there is no other recourse for disposing of the matter and in *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd* [2013] eKLR that ;
- “where there is a remedy in Civil Law a party should pursue that remedy... not every ill in society should attract a constitutional sanction... such sanctions should be reserved for appropriate and really serious occasions.”
38. On the issue of orders sought, it is submitted that the Kshs. 2,605,000 is a claim for special damages which must be specifically proved. That the report filed does not demonstrate proof as there is no evidence of actual payments - see *Capital Fish Ltd v Kenya Power & Lighting Co. Ltd* [2016] eKLR, *Provincial Insurance Co. E.A Ltd v Mordecai Mwangi Nandwa*.
39. It is further argued that special damages should not issue in a Constitutional petition and the court was referred to Court of Appeal in *PAK & Anor v AG & 3 others* Const. Pet E009/2020) [2022] KEHC 262 KLR. This principle was borrowed from *S. Africa Mvumvu v Minister for Transport* [2011] ZACC : the court had stated that;
- “in determining a suitable remedy the courts are obligated to take into account not only the interest of the parties, whose rights are violated, but also interests of good government. These compelling interests need to be carefully weighed...
- Once the appropriate relief is established it becomes unnecessary to award assessment of damages as an additional remedy where the object of the damages is not to compensate the claimant of the loss they have suffered but to uphold *the Constitution...*”
40. The respondent submits further that in *Shiverenje Simani v Star Newspaper & Another* [2021] eKLR the petitioner’s request for special damages was denied and the court relied on *Gitobu Imanyara & 2 others v AG* [2016] eKLR where the court citing the South African case of *Dendy v University of Witwatersrand Johannesburg & others* [2006] ILRC 291 - the court held that;
- “... the primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases to vindicate the fundamental rights not compensatory. “ The court further stated that.
- “ the test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed...it was not only the plaintiff’s interest but interest of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”
41. On the issue of general damages as relief for violation of fundamental rights it was submitted that it is discretionary see *Shiverenje Simani* above, and *Peter Mauki Kaijanje & 9 others v Chief of Defence Forces & anor* [2019] eKLR. This discretion must be exercised judicially, upon reason and principle.
42. With respect to the declarations - it is submitted that the petition has not demonstrated any violation of any rights, as a result the petition should be dismissed with costs.
43. From the foregoing the issues to be determined are
1. Whether the petitioner has locus
 2. Whether the petitioner’s right under Article 31(b) & 40(3) of *the Constitution* were violated



3. What orders to make

44. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the Court of Appeal stated that the “Standard guide for locus stand must remain the command in Article 258 of *the Constitution*.” It gives every person the right to institute court proceedings claiming that *the Constitution* has been contravened or is threatened to be contravened.
45. From the authorities cited herein it was necessary for the petitioner to demonstrate how it had acquired locus. The claim is based on things that happened to motor vehicle registration no. KAG 411U - however from the factual settings no nexus was laid between the petitioner and the said motor vehicle. The motor vehicle was not registered in its name i.e Rising Rays Investments Ltd . Jeremiah Muange simply deponed that it was intended for the supervision of work that the petitioner was carrying out. However, the mere fact that that Jeremiah Muange is a Director and Shareholder of the petitioner does not create the necessary connection to create locus. Other than that he provided no evidence to show that the petitioner was the beneficial owner of the said motor vehicle - he did not provide evidence to support his claim that the motor vehicle was purchased for the purpose and use by the petitioner. This was very important because Article 31 (b) is about person’s possessions and Article 40(3) is about a person and property .
46. The petitioner did not demonstrate how motor registration no. KAG 411U was its possession, or how it was its property - the evidence before court is that the motor vehicle was the property Jeremiah Muange & another in whose name it was registered at the material time and that other was not the petitioner. I must find that the petitioner did not establish locus, and consequently could not claim violation of its rights to the said property.
47. The petitioner relied on *Robert K. Ayisi* above and the unconstitutionality of parts of Section 44 of the *Tax Procedures Act* Cap 468 B but on a careful consideration of the facts of that case and the facts of this case – one will see the distinction. In this case the respondent’s witness deponed that they acted on the powers donated by Section 210(c) and 213 of the EACCMA, 2004. Section 213 allows an authorized officer to seize goods liable for forfeiture if found dutiable and duty not paid. In *Robert K. Ayisi* - it is the Tax procedure Act Section 44 (1) & (2) & 60(1) to (3) that were declared unconstitutional for good reason - invalidity according to Article 24 of *the Constitution* for having the effect of limiting the rights conferred by Article 31(b) of *the Constitution*.
48. Here, the respondent was not acting under the *Tax Procedures Act*, and but the East African Community Customs Management Act, 2004 to that extent *Robert K. Ayisi* is not applicable to this case.
49. In addition the motor vehicle was seized in the presence of the said Jeremiah Muange . The EACCMA states:
- 213.
- (1) An officer or a police officer or an authorised public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.
- 214.



- (1) Where any thing has been seized under this Act, then, unless such thing was seized in the presence of the owner of the thing, or, in the case of any aircraft or vessel, of the master thereof, the officer effecting the seizure shall, within one month of the seizure, give notice in writing of the seizure and of the reasons to the owner or, in the case of any aircraft or vessel, to the master:

50. With respect to damages the petitioner also relied on Robert K. Ayisi - in that case the court found that the petitioner's right to dignity had been violated - and awarded damages at Kshs. 2,000,000 . In this case the petitioner seeks "general damages for illegal seizure of the motor vehicle leading to loss of income amounting to Kshs. 2,605,000. The submissions - it is submitted

"With regard to compensation ... he rely heavily on Robert K. Ayisi ... where the court awarded the sum of Kshs. 2,000,000 for violation of the constitutional rights."

51. I have demonstrated that, that is not the position – the award was with respect to violation of the right to dignity which is not the case here.

52. The damages sought are specific Kshs. 2,605,000 and I agree with respondent's submission that they are in the nature of special damages – which the petitioner was required to plead specifically and prove.

53. Other than the report annexed to the affidavit the petitioner did not provide proof - 1st of the connection between the motor vehicle and its business, and evidence of how its business was affected by the alleged loss.

54. Loss of income is very specific claim that requires to be specifically proved. A report done would not prove that money was paid to a 3rd party. The report states that " the charges to be claimed should only be for working days of every month." The report proceeds to count days from 6/5/2020 to March 2022 and multiplies by Kshs. 4,500. However whether or not the money was paid – the actual proof is not set out. The petitioner simply threw some MPESA statements to the court.

55. Be that as it may, the petitioner did not prove the claim for loss of income at Kshs. 2,605,000.

56. Did this matter meet the constitutional threshold; with respect to the claim for special damages and loss of income the petitioner had recourse in the Civil court to sue for the release of the motor vehicle , for damages for loss of income and loss of user as claimed. It is my view that those claims did not fall within purview of a constitutional petition and in any event the petitioner did not establish the violation of the alleged constitution rights.

57. By the time this petition was filed on 22/9/2022 the motor vehicle had been in the custody of the police from 5/5/2020- The decision to charge was made vide the letter dated 17/10/2022 from the ODPP after the DCI wrote to them on 24/8/2022.

From the ODPP the evidence was only sufficient to charge the suspect Jeremiah Muange Musyoka for being in possession of a suspected stolen motor vehicle Contrary to Section 323 of the Penal Code as read with Section 36 of the same code - a misdemeanor punishable by a maximum sentence of 2 years imprisonment with or without a fine.

58. DCI Makueni stayed with the motor vehicle for about 1 year before handing over to DCI KRA – after seizing the motor vehicle on 5/5/2020 - Jeremiah appeared before him on 6/5/2020 and recorded a statement . It is not clear from C.I Kawira's affidavit what they were doing with the motor vehicle all this time.

59. I have not seen evidence of any work that DCI Makueni did other than detain the motor vehicle.



60. Everything that the DCI KRA did , did not reveal anything related to the suggested offence - and the DPP had not preferred any charges by the time parties were filing submissions - but if they did there was inordinate delay.
61. The petitioner's claim is therefore misplaced in my view – the people who took possession of the motor vehicle were the DCI Makueni i.e the National Police Service - the DCI - KRA Unit continued to have the motor vehicle held at the Police Station Makueni and there is no evidence before me that at any time - the KRA got involved or was involved in the matter directly to warrant the suit against them. The DCI Officers Makueni, acting on their own seized the motor vehicle and detained it - and
62. Section 213 (4) of the EACCMA requires that the police officer can detain the thing seized - but act in accordance with Section 213 (5)
- a. The police officer shall give notice in writing of the seizure and detention , and the intention to retain the thing in custody of the police, together with full particulars of the thing, to the nearest customs office.
 - b. As officer shall be permitted to examine that thing and take account at any time while it remains in the custody of the police.
 - c. Where the court orders for its release the commissioner shall assess and collect any duty payable prior to restoration of the thing to the owner.
63. The police are not parties to this petition – but from the foregoing it is evident that there is no evidence the customs office was informed of the seizure of the motor vehicle so as to enable the provisions of this Section 213 to come into play - whereby if the issue was unaccustomed goods - the same could have been assessed and paid and motor vehicle released to the owner.
64. The police officers in this matter have not stated anywhere that they actually complied with the full provision of this law - hence the seizure and possession was not communicated to the customs officer - to warrant the bringing of the suit against Kenya Revenue Authority. In my considered view the whole seizure and the detention was by DCI officers - and going by the proposed charges by DPP - it is them that Jeremiah Muange Musyoka ought to have sued.
65. In the circumstances I find that;
1. The petitioner did not establish locus standi to bring this petition.
 2. The petitioner did not establish that their rights as per Articles 31(b) & 40 (3) of *the Constitution* were violated or threatened with violation.
 3. The petitioner failed to prove the special damages sought and ought to have filed that claim before the civil court.
 4. From the facts before me the petitioner did not establish the applicability of the *Tax Procedures Act* to this case and Robert K. Ayisi is not applicable to this case.
 5. The petition is not merited and is dismissed with costs.

DATED SIGNED AND DELIVERED, VIA CTS ON 20/8/2024.

MUMBUA T. MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA



THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-08-20 21:19:33

The Judiciary of Kenya

