



**Executive Super Rides Limited v Director of Criminal Investigation & 2 others;  
Khatri (Interested Party) (Petition 183 of 2020) [2023] KEHC 18343 (KLR)  
(Constitutional and Human Rights) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18343 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 183 OF 2020**

**PM NYAUNDI, J**

**APRIL 28, 2023**

**IN THE MATTER OF A CONSTITUTIONAL PETITION BROUGHT PURSUANT TO  
ARTICLES 22, 23, 165(3)(B) & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE SUPREMACY OF THE  
CONSTITUTION AS PER ARTICLE 2(1) AND (4) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLE 27 AND 49 (1)(A), (II) & (III) & (D), 50 (2)  
(A) & (B) OF THE CONSTITUTION REGARDING THE RIGHT TO A FAIR TRIAL**

**AND**

**IN THE MATTER OF OBLIGATIONS OF STATE AND PUBLIC OFFICERS**

**AND**

**IN THE MATTER OF PRINCIPLE OF LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF UNLAWFUL AND ILLEGAL SEIZURE  
AND DETENTION OF PRIVATE PROPERTY AND  
CONTRAVENTION OF THE OWNERS FUNDAMENTAL RIGHTS**

**BETWEEN**

**EXECUTIVE SUPER RIDES LIMITED ..... PETITIONER**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATION ..... 1<sup>ST</sup> RESPONDENT**



**REGIONAL HEAD OF CRIMINAL INVESTIGATION NAIROBI**  
**COUNTY ..... 2<sup>ND</sup> RESPONDENT**  
**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**  
**AND**  
**BHUPESH KHATRI ..... INTERESTED PARTY**

### **JUDGMENT**

1. The Petitioner is a Company incorporated in the Republic of Kenya dealing with importation of new and used motor vehicles.
2. The 1<sup>st</sup> Respondent is a public officer and the head of the Directorate of Criminal Investigations, a department of the National Police Service established under Article 244 of *the Constitution* of Kenya, 2010.
3. The 2<sup>nd</sup> Respondent is a public officer and the Regional head of the Directorate of criminal Investigation, in the County of Nairobi.
4. The Interested Party is an adult male of sound mind working as an importer of new and used vehicles for gain.
5. The Petition is supported by Affidavit of the Anthony Wambugu who is the General Manager of the Petitioner.
6. The petition is premised on the following Articles of *the Constitution*, Article 2 (1), 4, 22, 23, 27, 49 (a), (i) (ii) & (iii), (d), 50(2)(a) & (b) 165 (3) (b), and 258.
7. The Petition dated 28<sup>th</sup> May 2020 prays for the following Orders;
  - a. A declaration be and is hereby issued that the institution and continuation of Criminal Investigations by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent of the Petitioner on complaints or in respect of any offences related to the claims in respect of 17 motor vehicles is unconstitutional
  - b. An order of injunction and/or prohibition from instituting or continuing any criminal prosecution of the Petitioner and or repossession of any of the 17 motor vehicles purchased from the interested party on complaints or in respect of any offences related to the claims in relation to the 17-motor vehicle.
  - c. An order of injunction hereby be issued for the unconditional release of motor vehicle KCR 474S
  - d. An order be issued staying any criminal proceedings against the Petitioner in respect of any offences related to the claim over 17 motor vehicles purchased from the interested party
  - e. The costs of this Petition be borne by the Respondents
  - f. Any other orders that this honorable court may deem fit to grant.
8. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a Replying Affidavit dated 23<sup>rd</sup> March, 2021 sworn by one Isack Tenai, a police officer attached to the 1<sup>st</sup> Respondent. The interested party did not file a response to the Petition.



9. The Petitioner filed a supplementary affidavit sworn on 14<sup>th</sup> January 2022 in response to the Respondents Replying Affidavit.

### **The Petitioner’ S Case**

10. The Petitioner deposes that they bought a total of 17 motor vehicles from the interested party and paid a sum of Kshs. 56,951,500.00. The Petitioner and the interested party fell out due to the dealings related to the motor vehicles. The interested party allegedly refused to hand over six logbooks stating that he was withholding them as lien over an outstanding amount of Kshs. 5,756,500/=.
11. According to the Petitioner, on 23<sup>rd</sup> May, 2020 the interested party together with one of his clients and policemen stormed into the petitioner’s premises and took motor vehicle KCR 474S and the vehicle was taken to Ruiru Police Station without any explanation to the Petitioner. The petitioner deposes that on following up with the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> respondent threatened to close up the Petitioner’s business unless the debt was paid.
12. The Petitioner deposes that there is money owing to the Interested party which is Kshs. 5,765,500.00 relating to two motor vehicles yet the retained log books belong to vehicles which have already been paid for. That the Petitioner has acknowledged the debt for the two motor vehicles but is challenging the threat to repossess all the other motor vehicles. That the interested party has refused to provide logbooks, sale agreements and ETR invoices.
13. According to the Petitioner, the 2<sup>nd</sup> respondent has instituted criminal charges based on the Interested party’s complaint and is threatening to close down the Petitioner’s business. The Petitioner argues that the 2<sup>nd</sup> respondent instituted charges without conducting an investigation which is unlawful.
14. The petitioner deposes that the criminal investigations against them is a contravention of the petitioner’s fundamental rights to a fair trial, fair administrative action and an abuse of the legal process, and is also a violation of the Petitioner’s right to fair administrative action.
15. According to the Petitioner, the actions of the Respondents are unconstitutional and ought to be declared null and void as the commencement of the criminal investigations and proceedings is meant to force the Petitioners to settle civil claims which the Interested Party has with the Petitioner.

### **1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s Case**

16. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondent filed a Replying Affidavit dated 23<sup>rd</sup> March 2021 and sworn by Isack Tenai a police officer attached to the Directorate of Criminal investigation in the National police Service.
17. It is stated that on the 20<sup>th</sup> May 2020, the interested party reported that the Petitioner had failed to pay him for cars sold. Further that the Petitioner issued cheques to the Interested Party which on presentation were not honored by the bank, on account of insufficient funds. And finally, that the Petitioner had issued death threats to the Interested Party.
18. Acting on the above information having been supplied with copies of the dishonored cheques the Respondents moved to impound the 2 vehicles that had not been paid for as evidence in the investigations that were initiated to investigate the commission of the following offences;
- a. Obtaining of motor vehicles by False pretense
  - b. Receiving death threats from the petitioner
  - c. Issuing of bounced cheques



19. That the action of the Petitioner caused the dispute to metamorphosize to a criminal offence.
20. In summary the Respondents contend that the actions of the Petitioner constituted a criminal offence, and the law should be allowed to take its course.
21. The respondents submit that their actions are within their constitutional mandate and that they should not be hampered from the execution of their duties.
22. Parties agreed to canvass the application by way of written submission. The Petitioner filed Submissions and Supplementary Submissions dated 11<sup>th</sup> February 2021 and 14<sup>th</sup> January 2022 respectively. The Respondents submissions are dated 14<sup>th</sup> day of June 2022. Parties also highlighted their submissions.

### **Analysis and Determination**

23. I have keenly read and understood the substance of this petition. It is evident that the criminal investigations initiated by the Respondents stem from the delayed payment by the Petitioner of cars that he had bought from the Interested Party. The other issue that emerged is that the Petitioner issued the Interested party with cheques, which cheques were dishonored when presented for payment. It was these bounced cheques and delayed payment that formed the basis for the criminal charges that the respondents were investigating.
24. During the investigations, the respondents forcefully took possession of motor vehicle KCR 474 S and KCV 919 F. It is not disputed that payment had not been made for these 2 cars and that the outstanding amount was Kshs. 5,765,500.00
25. It is also not disputed that the interested party was holding onto 6 logbooks as lien for the outstanding amounts.
26. On 4<sup>th</sup> June 2020, the parties recorded a consent as hereunder.
  1. that the Petitioner deposit Kshs 5,756,550 in court within 14 days
  2. That the logbooks for the vehicles that have been paid for be released to the Petitioner together with all the agreements and the receipts
  3. That the logbooks for the two (2) vehicles in dispute be deposited in court
  4. That the Respondents be restrained from instituting or continuing any criminal investigation related to the sale of the 17 motor vehicles pending the hearing and determination of this matter
  5. That in default, the Respondents and the interested party be at liberty to proceed with whatever lawful action they may wish to take.
  6. That in default, the respondents and the interested party be at liberty to proceed with whatever lawful action they may wish to take.
27. At the time of the hearing of the Petition all the orders in the consent had been complied with except for (b).
28. Having considered the pleadings and the submissions of the parties herein I frame the following issues for determination.
  1. Whether this court has jurisdiction to determine the Petition



2. Whether the Petitioner's constitutional rights as enshrined under Articles 27, 49 (i)(a), (ii) & (iii), (d), 50(2)(a) & (b) have been violated or threatened to be violated?
  3. Is the Petitioner entitled to the reliefs sought?
29. Whether this Court has jurisdiction to determine the Petition?
- The Respondents submit that this being a commercial dispute the constitutional court is not the forum for the Petitioner to canvass this case and relies on the doctrine of constitutional avoidance as enunciated in the cases of Communications Commission of Kenya v Royal Media Services Ltd & 5 Others; the South African Case of S Vs Mhlungu [1995](3) SA 867 (CC) and the US Case, Aswander Vs Tennessee Valley Authority 297 U.S. 288,347 (1936) where the Courts have held that a Court will not determine a constitutional issue, when a matter may be properly be decided on a another basis.
30. It is common ground that the matter emanates from a commercial transaction between the Petitioner and Interested party gone sour. The Petition presented to court challenges the actions of the Respondents that sought to transform what is essentially a commercial dispute to a criminal matter.
  31. It is contended by the Petitioner that the initiation of criminal charges against him is intended to pile pressure on him to comply with the Interested Party's demands. He pleads in the Petition that these actions are a violation of his rights contrary to Articles 27, 49 and 50 of *the Constitution*.
  32. From my reading of the Petition and the Submissions of the Petitioner it is evident that he is seeking a determination of whether the actions of the Respondents constitute an infringement of his rights and an abuse of legal process. Article 165 (3) (b) confers on the High Court the 'Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.' Article 165 (d)(ii) also mandates this court to determine the 'question whether anything said to be de under the authority of this constitution or of any law is inconsistent with, or in contravention of, this constitution'.
  33. The Petitioner is challenging the actions of the Respondents, the contention between the Petitioner and Respondents is not Commercial. For this reason, I decline to invoke the Constitutional avoidance doctrine and find that the Petition is properly before the Court.
  34. Whether the Petitioner's constitutional rights as enshrined under Articles 27, 49 (i)(a), (ii) & (iii), (d), 50(2)(a) & (b) have been violated or threatened to be violated?
  35. The Petitioners grievance is that the Respondents are turning what is a civil matter into a criminal matter. That in so doing they are acting in contravention of Articles 27,47, 49 and 50 of *the Constitution* of Kenya. It is the Petitioners position that if the Respondents had given him a fair hearing, they would have taken a different view of the complaint of the Interested Party and would not have initiated a criminal investigation as the matter is clearly a civil dispute.
  36. The Petitioner further contends given the clear nature of the case, the initiation of the criminal proceedings is merely intended to harass and intimidate him and apply pressure so that he balks and concedes to the demands of the interested party.
  37. The Petitioner alleges the infringement of the following rights;
    - 1) Article 27(1)
      1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.



2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
  3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres.
  4. The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
  5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
  6. To give full effect to the realisation of the rights guaranteed under this Article, the state shall take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
  7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
  8. In addition to the measure contemplated in clause (6) the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
- 2) Article 49 An arrested person has the right- (inter alia) (a) to be informed promptly in language that the person understands of;
- a. The reason for the arrest
  - b. The right to remain silent.
  - c. The consequences of not remaining silent.....
  - d. not to be compelled to make any confession or admission that could be used against the person
- 3) Article 50 (2) Every accused person has the right to a fair trial that includes the right
- a. To be presumed innocent until the contrary is proved.
  - b. To be informed of the charge, with sufficient detail to answer it.
38. The Petitioner challenges the Respondent's decision to initiate criminal investigations against him, the impounding of his vehicles and the fact that he was not given an opportunity to present his response and explanation as to the reason for the stalemate between him and the Interested Party.
39. It is the Petitioner's case that the Respondents actions are in contravention of the Constitutional and statutory mandate.
40. The Petitioner relies on the decisions in Republic Versus Director of Public Prosecution and Another x Parte Chamanal Vrajlal Kamani & 2Others [2015] eKLR; Investments & Mortgages Bank limited ( I &M) versus Commissioner of Police and the Director of Criminal Investigations Department & DPP &2 Others [ 2013] eKLR; Joram Mwenda Guantai versus The Chief Magistrate, Nairobi [2007] eKLR; Njuguna S. Ndungu versus EACC & 3Others [2015] eKLR; Republic versus Judicial Commission of inquiry Into the Goldenberg Affair & 2Others Ex Parte George Saitoti [2006] eKLR



41. In opposing the Petition, the Respondent submits that the actions of the Petitioner amount to recognized criminal offences and that they acted within the scope of their mandate as enshrined within *the constitution* of Kenya.
42. Further the Respondent asserts that the Petitioner has failed the test as laid out in the Annarita Karimi Njeru case, which has been reiterated in the cases of Samuel Murigi Waigwa v Director of Criminal investigations & 3 Others [2019] eKLR and Lt. Col Peter Ngari Ngumi & Others Vs Attorney General, Constitutional Application N. 128 of 2006.
43. The Respondents aver that whereas the Court has the discretion to stop proceedings the discretion must be exercised cautiously and relies on the decisions in Total Kenya Ltd & 9 Others versus Director of Criminal investigations & 3 Others [2013] eKLR and Kenya Commercial Bank Ltd and 2 Others v Commissioner of Police & Anor, Nairobi Petition NO. 218 of 2011.
44. As summarized above there is consensus that the genesis of the whole matter is a commercial transaction gone awry. Both the Petitioner and the Respondent have remained adamant with the Petitioner insisting that the Interested Party furnish him with receipts and other documentation to enable him comply with the Kenya Revenue Authority requirements and the interested party holding onto log books of 6 vehicles until the respondent makes good the outstanding payments in respect of 2 motor vehicles.
45. The issue for determination is whether in the course of time, the issue metamorphosed from a commercial transaction to a criminal offence. The Respondents contend as such and rely on the delay/failure to pay for 2 motor vehicles that the Petitioner transferred to third parties. The issuance of cheques that were dishonored and finally the issuance of death threats to the interested party.
46. The Petitioner on the other hand contends that at all times the transaction was commercial, that he had persistently asked the Interested Party to furnish him with documentation required by KRA and he had failed to do so. He was holding onto the payment for the 2 cars so that he gets the documentation.
47. The Respondent and the Interested Party have a long-standing business relationship.
48. Having considered the accounts and submissions of the Respondent and the interested party. I am persuaded that the dispute is essentially a commercial one. Both parties have cogent reasons for the stance that they have taken. The interested party has exercised different tactics to apply pressure on the Petitioner to pay. Prior to reporting the matter to the police, he had held onto logbooks for 6 cars as lien.
49. I observe that had the police made enquiries from the Petitioner, they may have arrived at a different decision. I think so because the account at paragraph 16 of the Replying affidavit sworn by Isack Tenai has key gaps. For instance, on the issue of the dishonored cheques, did the Police consider that the same were issued in September 2019 and October 2019 and not banked until March 2020. Did the Police interrogate the Petitioner's claim that substitute cheques had been offered and that the Interested Party was holding onto these, notwithstanding that the Petitioner had asked for their return.
50. On the 2 cars, the Interested Party retained the logbooks. The question is whether the police factored this, even as a decision was made to impound the vehicles. The summary of the facts as set out in paragraph 16 of the Affidavit shows that the police were swayed by the account of the interested party and discounted that of the Petitioner.
51. For these reasons I find that the manner in which the Respondent handled this matter fell short of the objects and functions of the National Police Service as set out in Article 244 of *the Constitution*, which requires inter alia that the Police strive for the highest standards of professionalism and discipline among its members, that the police comply with the constitutional standards and of human rights and



fundamental freedoms; and train staff to the highest possible standards of competence and integrity to respect human rights and fundamental freedoms.

52. I am persuaded by the decision of Majanja J. in *Investments & Mortgages Bank Limited (I&M) v Commissioner of Police and the Director of Criminal Investigations Department Supra*, where the Learned Judge stated

[33] ...It is the duty of the Court to ensure that its processes are not abused or otherwise used to perpetuate injustice or improper motives. In the *Kenya Commercial Bank Ltd and 2 Others Vs Commissioner of Police and Another (supra)* I observed, [23] Although this matter is not one where criminal proceedings have not been commenced, it is one where the risk of criminal proceedings hangs over the heads of the Petitioners. It is recognized even in the light of Section 193A of the Criminal Procedure Code, the High Court may stop proceedings were such proceedings, actual or contemplated, are oppressive, vexatious and abuse of the court process and a breach of the fundamental rights and freedoms. This power though must be exercised sparingly as it is in the public interest that crime is detected and those suspected of criminal conduct are brought to face the consequences the law prescribes.'

53. The actions of the Interested Party and the Respondent constitute an abuse of the legal process and the Court is constrained to prohibit the same. Having determined this the other issue for consideration is whether the Petitioner has satisfactorily proved that his rights were violated.

54. Rule 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (also known as the Mutunga Rules) provides for the Form of Petition.

(2) The Petition shall disclose the following;

- (a) the Petitioners name and address
- (b) the facts relied on
- (c) the Constitutional provision violated
- (d) the nature of injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit; or in public interest case to the public, class of persons or community.
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.

55. The Petition cites Articles 27, 49 and 50 as the ones that have been infringed by the actions of the Respondent. In paragraph 12 of the Petition the Petitioner alleges a violation of his rights under Article 47 and in the supplementary submissions refers to Article 31 (c) and (d) of the Petition.

56. Given the express provisions of the Mutunga Rules on the Form of the Petition, I find that the Petitioner cannot present the allegations with respect to the violation of rights through submissions as the Respondent was not given an opportunity to respond or challenge the same.

57. With regard to the alleged violation of Article 47, this claim must fail. First the Article is not among those cited on the face of the Petition and further the Petitioner does not provide details on how the right was infringed.



58. With regard to the alleged violation of Article 49 and 50 the Petitioner has not provided sufficient detail to enable the court determine whether his rights were infringed. With regards to Article 49, the Petitioner does not suggest that he was arrested.
59. With regards to Article 50, the Petitioner does not provide details on how his rights to a fair trial are threatened. In any event in its decision in *Hussein Khalid and 16 others V Attorney General & 2 Others* [2019] eKLR the Supreme Court stated;
- (86) In alleging breach of the right to a fair hearing before even arraignment in court, the Appellants have put the cart before the horse. It is the Appellants who are removing themselves within the guarantees of Article 50(1) by not subjecting themselves to the trial court's jurisdiction where their innocence may be affirmed or guilt proved. In any event, the criminal justice system has full cushion against the violations alleged by the Appellants which the trial court is ably equipped to address when raised by an accused person legitimately in the course of the trial...
60. The Petitioner also alleges violation of his rights under Article 27 of *the Constitution*. As set out above, Article 27 provides both for equality before the law and non-discrimination. The Petitioner has not set out in the Petition and in the submissions the particulars of violation under this provision. It seems that the Petitioner expects the Court to be equipped with a heavy duty shovel to dig and unearth specifics of violations under the cited provisions. This is not a role the Court is prepared to play.
61. For the foregoing reasons I find that the Petition in this case has failed the test laid down in the *Annarita Karimi Njeru* case.
62. Is the Petitioner entitled to the reliefs sought?
- The Petitioner seeks to prohibit the institution and continuation of criminal investigations by the Respondents against him in respect of any offences related to the claims in respect of the 17 motor vehicles.
63. Having found that that the initiation of the criminal investigations against the Petitioner was an abuse of legal process, I am inclined to grant the prayers sought.
64. At the hearing the Interested Party sought the release of the money deposited in Court. I note that the parties filed a consent in court on 4<sup>th</sup> June 2020 providing for the conditions to be met in order for the money to be released to the Interested Party.
65. In view of the foregoing the following orders are made;
1. A declaration is issued that the institution and continuation of Criminal Investigations by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent of the Petitioner on complaints or in respect of any offences related to the claims in respect of 17 motor vehicles is an abuse of legal process and unconstitutional.
  2. An injunction and/or prohibition order issues barring the respondents from instituting or continuing any criminal prosecution of the Petitioner and or repossession of any of the 17 motor vehicles purchased from the interested party on complaints or in respect of any offences related to the claims in relation to the 17 motor vehicles.
  3. The matter to be mentioned before the Registrar within 14 days to confirm compliance with the consent recorded on 4<sup>th</sup> June 2020 and subject to compliance the money deposited in court be released to the Interested Party and thereafter logbooks be released to the Petitioner
  4. Each party to bear their own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2023.

P. NYAUNDI

JUDGE

**Judgment read and delivered in the presence of:**

.....for the Petitioner

..... for the Respondents

..... Court Assistant

