



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 16 OF 2014**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL**

**FREEDOMS UNDER ARTICLES 22, 31, 39 AND 40 OF THE CONSTITUTION**

**BETWEEN**

**KEFA NYAGA KARIUKI.....PETITIONER**

**VERSUS**

**THE OFFICE COMMANDING STATION KIKUYU POLICE STATION.....1<sup>ST</sup> RESPONDENT**

**THE OFFICER COMMANDING STATION EMBU POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL KENYA POLICE SERVICE.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**WELTON KIBIWOTT TUBEL.....INTERESTED PARTY**

**JUDGMENT**

1. Before me is an amended petition dated 16.12.2014 wherein the petitioner seeks for orders: -

- i. That an order do issue that the respondents jointly and severally forthwith release motor vehicle registration number KBN 386Z Toyota Noah to the petitioner.
- ii. An order that the respondents do jointly and severally pay general damages to the petitioner for unjustifiable deprivation of his property.
- iii. Costs of the petition.
- iv. Such further or other orders that this Honourable Court deems fit to grant.

2. The petition is premised on the grounds on its face and further supported by the affidavit sworn by petitioner. The applicant's case is that on the 04.07.2014, the petitioner herein bought motor vehicle, KBN 386Z Toyota Noah for an amount of Kshs. 500,000/=. That the sale and purchase took place at the petitioner's premises located within Embu town along the Embu /Meru Road. That the seller had all the legal documents to the motor vehicle namely: the original log book, copy of the owner's identity card, copy of the owner's KRA PIN Certificate, the original transfer form for the motor vehicle and a copy of the sale and purchase agreement between the seller Patrisio Mwenda Rukunga and Kefa Nyaga Kariuki, the petitioner herein. That the petitioner took possession of the motor vehicle and kept it in his premises and that on

06.09.2014, police officers from Embu and Kikuyu Police Stations descended on the petitioner's premises demanding the car keys and then drove off with the aforesaid motor vehicle.

3. In the same breadth, a notice of motion dated 16.12.2014 was filed premised on the grounds on its face and further supported by the affidavit of Kefa Nyaga Karuiki sworn on 11.12.2014 in which he reiterates the grounds as set out on the face of the notice of motion.

4. Welton Kibiwott Tubei via a notice of motion dated 20.03.2015 sought for orders *inter alia* that he be granted leave to be joined as an interested party in the case herein and further that the motor vehicle remain under his custody until the petition is heard and determined on the grounds *inter alia* that he is the legal owner of the motor vehicle in question.

5. The respondents filed grounds of opposition to the application dated 16.12.2014 in which they argued that under Article 24, the fundamental rights of the petitioner are not absolute; that the ownership of the said motor vehicle may be in dispute and its real owner is yet to be established hence cannot be released to the petitioner at that particular stage; that the petition herein is unmeritorious due to non-disclosure of constitutional violations in precise and specific manner and that the petition is an abuse of court process and the same should be dismissed with costs.

6. On 23.12.2014, the court ordered *inter alia* that the vehicle in question be released to the petitioner forthwith; that if the said vehicle will be required as an exhibit in some future proceedings, the same be preserved by way of photographic evidence to be taken forthwith and that the main petition be fixed for hearing.

7. The court further gave directions on the hearing of the petition which was to be by way of written submissions and each part filed their submissions.

8. The petitioner submitted that the respondents herein have disobeyed the court's orders since the motor vehicle was never released to the petitioner as was ordered by this court and that since the interested party has also disobeyed this court's orders, he should not get any audience before this court. That his case was terminated when he committed contempt of court by refusing to release the motor vehicle in question. Reliance was made on the case of **Wildlife Lodges Limited v county council of Narok [2005]2 EA 344**.

9. The petitioner further submitted that the first violation of his rights to privacy was violated when the police entered his premises on 04.07.2014 and without notice to him and without any seizure warrant, took the said vehicle away, thus depriving him its use for a period of 7 years. It was his case that the respondents are guilty of violating his rights to the motor vehicle by seizing it from him. Further, reliance was made on the case of **HC Milimani Constitutional and Human Rights division Petition No. 96 of 2011**.

10. The respondents on the other hand submitted that the petition was an abuse of the court process since the petition had failed to disclose any constitutional violation as it had not precisely laid out any constitutional issues to be determined by the court; and further that, the petitioner had not shown the way the respondents have unjustifiably deprived him of his rights. Reliance was made on the case of **Anarita Karimi** where it was held that in order to obtain the intervention of the court, the party who alleges that his rights have been violated must with reasonable precision state the Articles of the constitution allegedly violated.

11. The court has carefully considered the Petitioners' Petition; the respondents' replying affidavits as well as party's rival submissions and from the aforesaid, the issue for determination is whether the petitioner's rights have been infringed upon, thus deserving compensation and/or damages as averred.

12. The respondents have raised an issue where it is alleged that the petitioner has failed to disclose any constitutional violation as he has not precisely laid out any constitutional violation to be determined by the court.

13. **Rule 10 of the Mutunga Rules, 2013** clearly provides what a competent Petition should include. **Rule 21(3) of the Mutunga Rules, 2013** provides that the court may frame the issue for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case and lastly, **Rule 22(2)(b)** provides that submissions shall contain a brief statement of facts with reference to exhibits, if any, attached to the petition, issues arising for determination ; and a concise statement of argument on each issue incorporating the relevant authorities referred to, together with the full citation of each authority.

14. To determine whether the respondents violated the rights of the petitioner, the respondents urged this Court not to entertain the petition since the petition does not meet the pleading test for constitutional petitions as laid down in **Anarita Karimi Njeru (supra)** and **Mumo Matemu (supra)**.

15. In **Anarita Karimi** the standard for drafting constitutional pleadings was set as follows:

**“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”**

16. The Court of Appeal affirmed the test outlined in **Anarita Karimi Njeru** and in **Mumo Matemu (supra)**. On its part the Supreme Court confirmed the importance of complying with the stated principle by stating in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** as follows:

**“[349] ...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show**

**the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v. Republic* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”**

17. The first question, therefore, is whether the petitioner has disclosed a violation of the Constitution, the constitutional provisions violated and the manner in which the provisions were violated. In his pleadings, the petitioner alleges violation of his rights and principles enunciated and protected by *inter alia* Articles 22, 31, 39 and 40 of the Constitution. His case is that the actions of the respondents have affected his rights. He has also specified the orders he is seeking against the respondents which he has tied to the statutory and constitutional mandates of the two offices. The petitioner cannot be said to have failed the drafting test. Whether his pleadings disclose a constitutional dispute is another issue altogether. This is the question which I now proceed to answer.

18. On whether the petitioner has established a case for the grant of the orders sought, the petition is premised on the articles and sections as indicated on the face of the petition. The alleged infringement of the petitioner’s rights under the said provisions is then tied to alleged violation of other constitutional rights being the right to property under Article 40.

19. The article thus state as follows:

**...every person has the right, either individually or in association with others to acquire and own property.**

20. From the foregoing, it is clear that Article 40 thus applies to the dispute herein.

21. The fact that the respondents raises the issue of ownership of the motor vehicle in question, is of importance considering that the same vehicle is alleged to have been acquired by fraud from the interested party herein. Further, it would be of importance to note that the petitioner’s right is not absolute more so if it is proven that the mode of acquisition is wanting. In this case, it was the respondents’ submission that investigations were being carried out since the interested party herein had reported the loss of the vehicle in question which vehicle was traced at the petitioner’s premises.

22. The above conclusions would then lead me to the question whether his rights were violated as alleged. In part C of the petition, the petitioner has enumerated the nature of injuries that have been caused to him. I am fully aware that it is self-evident that proving an injury or loss which is neither physical nor financial more so when the petitioner specifies that the respondents trespassed on his person, may present special problems for the witnesses and the judicial process, which aims at producing results objectively, justified by evidence, reason and precedent. Subjective feelings and the degree of their intensity are incapable of objective proof. In regards to claims such as trespass, wrongful arrest and confinement, deprivation of the property herein, I am convinced that the law provides for better avenues to ventilate and have such torts heard and determined. I am not convinced that filing this petition was the way to go.

23. The courts and tribunals have to do the best they can with the available material to make a sensible assessment, but I am constrained by lack of sufficient evidence to enable me to justify or explain a violation of rights without some kind of solid evidential foundation and persuasive practical reasoning in regards to the case herein. In *Ministry of Defence v Cannock [1994] 1 RLR* the court stated: -

**“Compensation for injury to feelings is not automatic. Injury must be proved. It will often be easy to prove, in the sense that no tribunal will take much persuasion that the anger, distress and affront caused by the act of discrimination has injured the applicant’s feelings. But it is not invariably so.”**

24. In my view, the petitioner has failed to discharge the burden of prove to the required standard. The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Bristone Pte Ltd v Smith & Associates Far East Ltd [2007] SGCA* :-

**“The cou**

**rt’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”**

25. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. In in view of the foregoing, I am unable to agree with the petitioner that he deserves damages and compensation prayed for.

27. The petition is hereby dismissed but with no orders as to costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022**

**L. NJUGUNA**

**JUDGE**

.....for the Petitioner

.....for the Respondents

.....for the Interested Party