



Mwando v DCIO, Isiolo Police Station & 3 others (Constitutional Petition 415 of 2019) [2022] KEHC 13396 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION 415 OF 2019**

EM MURIITHI, J

SEPTEMBER 29, 2022

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

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 49(1)(F)(I) OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 50(1) (2) (A) (B) (D) (E) (J) (K) OF THE
CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 50(4) OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 40(2) AND (3) OF THE**

CONSTITUTION

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER SECTION 106(4A) OF THE TRAFFIC ACT**

BETWEEN

JAMES KIBUKU MWANDO PETITIONER

AND



DCIO, ISIOLO POLICE STATION	1 ST RESPONDENT
O..C.S ISIOLO POLICE STATION	2 ND RESPONDENT
IRENE KANANA SAMUEL	3 RD RESPONDENT
ATTORNEY GENERAL	4 TH RESPONDENT

JUDGMENT

1. The petitioner filed a petition dated October 16, 2019 praying for specific reliefs as follows:
 - a. An order to compel the DCIO and OCS Isiolo Police station to release the Petitioner’s vehicle Registration No KCE xxxx from Isiolopolice station to the petitioner and an order compelling the DCIO Isiolo police station to release the keys of the said vehicle to the Petitioner.
 - b. An order to prevent any malicious and unwarranted arrest that may be targeted at the Petitioner herein.
 - c. An order compelling any other person who might be having the custody of the said motor vehicle to release it to the petitioner or such other order(s) as this honourable court shall deem just.

Petitioner’s case

2. The petitioner avers that he is a joint co-registered owner of motor vehicle Registration No KCE xxxx Toyota Probox together with Jijenge Credit Micro finance, which advanced him a loan of Ksh 1,392,245. In order to repay the loan, the petitioner leased the subject vehicle to one Joseph Mburu for Ksh 3,000 daily. On or about March 2018, after the subject vehicle failed to be returned to the petitioner within the agreed time frame, the petitioner successfully tracked it and lodged a complaint at Kasarani Police station. He complained that he had found a person unknown to him with the subject vehicle. The person alleged that Evanston Ngene Ndungu had fraudulently obtained Ksh 450,000 from her. She alleged that the said David Gichiga Kinyua had represented himself as the owner of the subject vehicle whereupon they entered into an agreement for the sale and purchase thereof. He wondered why the subject vehicle was deteriorating at Isiolo police station, yet he had greatly assisted the police to arrest and investigate the matter. He avers that the DCIO Isiolo has refused to give him the subject vehicle, as a result of which he continues to suffer irreparable loss, fundamental breach of his rights under articles 22(1), 40(1)(3)(b)(ii) and 50(2) (4) of the *Constitution* and damage for non-user and inability to repay his loan. He urges the court to intervene so that the subject vehicle does not continue being wasted due to lack of regular maintenance and repair.

The 1st, 2nd and 4th Respondents’ case

3. The 1st and 2nd respondents opposed the petition vide their grounds of opposition dated October 24, 2019, terming the petition as being frivolous, mischievous, vexatious and an abuse of the court process, as the petitioner, who has camouflaged a motor vehicle ownership dispute as a constitutional petition, has not demonstrated the violation or threatened violation of his fundamental rights and the manner in which they have been violated.



The 3rd Respondent's case

4. The 3rd respondent opposed the petition vide her response to the petition and a replying affidavit both dated October 15, 2020. She avers that the petition as filed is fraught with lies, falsehoods and half truths tailored to mainly hoodwink the court. According to her, the petitioner is a cheat and a crook, a member of a gang whose modus operandi is, one of the gang members sells a motor vehicle and before long another gang member emerges claiming that the motor vehicle belongs to him and that it has been stolen. Evanson Ngene Ndungu mentioned in the petition is the petitioner's partner in crime. On March 19, 2018 at Isiolo in a written agreement, the said Evanson Ngene Ndungu, who was in possession thereof, sold the subject motor vehicle for a consideration of Ksh 450,000 to her and thereafter surrendered the original log book to her. She paid a sum of Ksh 300,000 and the balance was to be paid upon transfer of the subject vehicle which was agreed to take place not later than March 22, 2018. When the petitioner failed to avail himself to effect transfer as agreed, she got suspicious as she began to receive funny calls from unknown people about the subject vehicle. She was accompanied by her husband, Samwel Mbiti Liburu, to the DCI office at Isiolo where they lodged a complaint. On or about March 29, 2018, the petitioner went to Isiolo pretending to be looking for the subject vehicle and attempted to make a report about it, but he was informed that there was an earlier report. Looking at the unfolding events, she lodged Isiolo CMCC 11/2018 in order to safeguard her interest, and therefore the subject vehicle is preserved at Isiolo police station pending investigations, in line with the court order of July 10, 2018. She avers that the petitioner is part of a large syndicate whose sole purpose is to fleece unsuspecting people of their money.

Submissions

5. The petitioner and the 3rd respondent did not file any submissions.
6. The 1st, 2nd and 4th respondents urge that the petitioner has failed to set out and show how they have violated or infringed his rights, and relies *James Gacheru Kariuki & 19 others v County Government of Mombasa & 56 others*(2019)eKLR and *East Africa Pentecostal Churches Registered Trustees & 1754 others v Samwel Muguna Henry & 4 others*(2015)eKLR. They accuse the petitioner of offending the doctrine of exhaustion, as he ought to have lodged a complaint with Independent Police Oversight Authority (IPOA), and relies on *Revital Healthcare(Epz) Limited & Anor v Ministry of Health & 5 others*(2015)eKLR, *Beekey Supplies Limited & Anor v Attorney General & Anor*(2017)eKLR.

Analysis and Determination

7. Having considered the amended petition, the responses thereto and the written submissions together with the authorities cited therein, the only issue for determination is whether the petition is merited.
8. The 1st, 2nd and 4th respondents contend that the petition offends the doctrine of exhaustion, as the petitioner ought to have lodged a complaint with IPOA. The petitioner's gravamen is that the arbitrary and prolonged detention of his motor vehicle by the 1st respondent, is a violation of his constitutional right to property, which question this court is properly suited to determine.
9. The 3rd respondent contends that there pends civil case No 11/2018 in Isiolo where it was ordered by consent on July 10, 2018 that, "the 3rd defendant DCIO do file a report in court in respect of investigations concerning motor vehicle registration number KCE 754 Y Toyota Station Wagon known commonly as Probox within one month; In the intervening period the said motor vehicle to be retained in the custody of the 3rd defendant; and the case to be mentioned on August 21, 2018 for further orders of directions in respect of the said application."



10. Fast forward to 2022, it is not clear from the record how far the investigations and the aforementioned civil case have gone. What is clear is that the subject vehicle is still being detained by the 1st respondent. The 1st respondent has not made any response to whether the investigations as ordered by the trial court were ever completed and the outcome thereof.
11. Annexure IKS 2 in the 3rd respondent's replying affidavit is copy of records showing that the subject vehicle was as at March 20, 2018 solely registered in the name of the petitioner. The petitioner has annexed to the petition another copy of records showing that as at October 16, 2019, the subject vehicle was jointly registered in his name and that of Jijenge Credit Limited.
12. This court would agree, generally, that in indeterminately keeping the petitioner away from his motor vehicle without any justifiable cause, his constitutional rights to property have been infringed. Besides, the petitioner has expressed his willingness to always avail the subject motor vehicle whenever required to do so by the court.
13. However, it is observed that the detention of the vehicle was pursuant to an order of the court in Isiolo CMCC No 71 of 2018. Detention by a lawful court order cannot found a case of illegal detention. The court, however, accepts that the trial court should have determined the issue since court order of August 10, 2018.
14. There shall therefore be an order for expedited hearing of Isiolo case as appropriate.

Orders

15. Accordingly, for the reasons set out above, the petitioner's case is struck out for being premature and the constitutional petition is capable of redress by alternative process other than by constitutional application. The Isiolo chief magistrate's court is directed to hear and determine the case before it on priority basis for an expedited disposal of the dispute as to ownership of the motor vehicle subject of the petition herein.

There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

