



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Coram: Odunga, J)

PETITION NO. 45 OF 2019

IN THE MATTER OF PETITION UNDER ARTICLES 22, 23, 40 AND 165 OF THE CONSTITUTION OF KENYA

BETWEEN

MUEMA MATIVO.....PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATION

BANKING FRAUD UNIT NAIROBI.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JEFFERSON KIOLI.....3RD RESPONDENT

AND

HFC LIMITED.....INTERESTED PARTY

JUDGEMENT

The Petitioner's Case

1. The Petitioner herein, **Muema Mativo**, in his petition dated 23rd December, 2019 contends that he, at all material times, had custody of motor vehicle reg. no. KBB 002X as well as its registration book. However, on November 2019 officers of the 1st Respondent including the DCIO Banking Fraud unit Nairobi and 3rd Respondent impounded the said vehicle together with the registration book claiming that the said vehicle had been offered as security to secure a loan and Banking fraud offences has been committed.

2. According to the Petitioner, immediately before the said raid the said vehicle together with pertinent registration book were in the Petitioner's exclusive custody and he had never offered the vehicle as security to secure any financial accommodation from any person or institution. He pleaded that the said vehicle was lawfully acquired by the registered owner and the Petitioner has been the lawful custodian thereof.

3. The Petitioner therefore pleaded that the acts of the Respondents' officers are illegal and they amount to arbitrary deprivation of property in violation of section 40 of the Constitution of Kenya and that they had no justification whatsoever to detain the subject vehicle. He averred that has never received any communication from the Respondents as to why his vehicle was detained and its whereabouts.

4. He therefore sought the following orders:-

a) A declaration that the decision of the 1st Respondent's officer and 3rd Respondent to deprive the Petitioner, the vehicle No. KBB 002X contravened the Petitioner's freedoms and rights to title to property.

b) To restrain the Respondents whether by themselves or by any servant or agent of them from howsoever preventing the Petitioner from his peaceful possession of the vehicle No. KBB 002X the subject of this petitions.

- c) Damages for violation of the Petitioner's fundamental constitutional rights.
- d) A writ of prohibition prohibiting the Respondents whether by themselves or through any of their servants and/or agents or others whoseever from depriving the Petitioner of any of his property in the Petitioner's custody.
- e) The cost of the petition be provided for.

5. In support of the petition, the Petitioner swore an affidavit on 23rd December, 2019 in which he restated the foregoing and added that he acquired vehicle and had exclusive custody of the said vehicle KBB 002X together with its respective registration book. On November 2019, director of criminal investigation Banking fraud unit Nairobi and 3rd Respondent claimed to be acting on a report by undisclosed bank a micro finance institution went to Kyumvi Machakos along Nairobi /Mombasa road and commandeered the said vehicle to Kyumvi police station where he detained it. He deposed that since he has never sought any financial accommodation from any Bank on the security to the vehicle or at all, the detention of the said vehicle was without any probable or justifiable cause.

6. After the said vehicle was impounded, it was however transferred to unknown place by the 3rd Respondent and since then he has never received any communication from the respondents as to why they detained his vehicle, the reason why it was detained and its whereabouts.

7. The Petitioner further averred that on 11th November, 2019 the vehicle had lost No. Plate and he reported the loss to Dandora Police Station on 11th November, 2019. On 9th November, 2019 the vehicle was inspected directorate of criminal investigations and it was confirmed that the chassis No. and the Engine No. were examined and found to be original and intact and there was no sign of interference noted. On 13th November, 2019 he applied for reflective Number plate which application is still pending.

8. He averred that on 10th December, 2019 his advocate on record issued a demand note to the Respondent to explain why they detained the vehicle but the said demand note was ignored as there was no response. In the meantime, he continues to incur the expenses and loss because of the detention of the vehicle for no cause.

9. The Petitioner averred that since the continued detention of the said vehicle is wrongful and unconstitutional, it will only be fair and just this Court be pleased to order immediate release and restitution of the vehicle to him.

10. In his further affidavit, the Petitioner reiterated that he is the owner of motor vehicle KBB 002X as hence the ownership of my motor vehicle KBB 002X is not in dispute. According to him, before my motor vehicle was impounded he had lost one of the number plates and reported the loss to the police and the Abstract from police records dated 11/11/2019 was issued. Upon examination of the vehicle, the directorate of criminal investigations confirmed the chassis number and the engine number to be original and intact and there was no sign of interference. He then applied for the replacement of the number plate.

11. The Petitioner therefore denied that his vehicle chassis number had been tampered with to conceal its true identity and a chassis restoration done as alleged or at all. While admitting that he was not a party to the alleged criminal case, he disclosed that he got aware of the existence of the criminal case number 2013/2019 he went to the court and applied for the release of his motor vehicle as it was not an exhibit in the said case as the police were alleging and the prosecution which represents the interested party did not oppose his application and his vehicle was released to him. He therefore denied that the order was made without the knowledge of the interested party.

12. The petitioner denied that on 12th November 2019 PC Allan Njoka a crime scene expert restored the chassis number of his vehicle as no photographs have been availed showing that the purported chassis number was restored to read JALFTR33HF7000825 as alleged. In his view, his chassis number is JALFTR33HF7000146 and the report is a false report with intention of misleading the court and aimed at defeating his petition as it was prepared after the release of his vehicle.

The Respondents' Case

13. In response to the Petition, the 2nd Respondent filed grounds of opposition in which it was contended that the Petitioner has not demonstrated with clear precision the manner in which his rights have been infringed; that the Constitution and the **National Police Service Act** mandates the 1st Respondent to investigate any complaint brought to their attention; and that these proceedings are incompetent and a blatant abuse of the court process and hence does not warrant the intervention of the Court.

14. On behalf of the interested party, an affidavit was filed sworn by its Head, Security & Investigations in which it was averred that the interested party granted to one of its customers named, **Shadrack Savali Muungami**, on express request, a financial facility in form of an asset finance on the terms and conditions set out in the letter of offer dated 28th January, 2016. The said facility was in the sum of Kshs 5,469,750.00 and was to facilitate the purchase of one New Isuzu FSR Truck which the said customer was purchasing from Ryce East Africa Limited.

15. It was averred that the said vehicle was registered as KCG 981R with Engine Number 481972 and Chassis No. JALFTR33HF7000825. Based on the said letter of offer, the interested party undertook to pay the financed sum and authorised the release of the said vehicle to its said. Consequently, the said vehicle was registered in the joint names of the interested party and its said customer.

16. However, the said facility was not repaid in accordance with the terms of the letter of offer as the customer defaulted on his obligations to repay the same and as result the customer was indebted to the interested party in the sum of Kshs 6,390,017.43 as at 22nd August, 2019 and the interest continues to accrue. As a result of the said default, the interested party in the exercise of its right set in motion the process of repossessing the said vehicle and issued instructions to Valley Auctioneers but as the said Auctioneers were unable to trace the said vehicle, the interested party lodged a complaint with the Banking Fraud Investigations Unit/Department seeking assistance in tracing and repossessing

the said vehicle.

17. According to the deponent, the said vehicle was traced by the said Unit's officers around Kyumvi area in Machakos and was repossessed though it had a different registration number affixed to it. His information was that the chassis number of the said vehicle had been tampered with to conceal its true identity and that a chassis restoration by the investigating officers confirmed that the original chassis number on the repossessed unit matches that of the vehicle purchased using the funds provided by the interested party.

18. As a result of the said investigations, the Unit arrested and charged the said customer with the offence of fraudulent disposal of a mortgaged good and an order was made by the trial magistrate on 6th February, 2020 directing that motor vehicle registration no. KBB 002X be released to the Petitioner herein. According to the deponent the release of the said vehicle when the Petitioner herein was not a party to the said criminal case and when motor vehicle registration no. KBB 002X was not subject of the proceedings in that court confirm that there is every possibility that the Petitioner and the said customer may be involved in a bogus and nefarious scheme to conceal the identity of motor vehicle KCG 981R which is the security for the repayment of the said facility. According to the interested party, by seeking the said order, the Petitioner's action conforms that both registration numbers relate to one and the same vehicle. It was disclosed that following he said order, both the prosecution and the interested party have applied to the High Court for revision.

19. In the interested party's view, the Petitioner's sole aim in these proceedings is to have this Court sanitise a fraudulent dealing in the said motor vehicle KCG 981R and if allowed would prejudice the fair trial of the pending criminal case and the said revision applications.

Determinations

20. I have considered the material placed before me in this petition. What comes out clearly is that by the time this petition was filed, the suit motor vehicle was still in custody of the Respondents. However, it would seem that an application was made before the trial court by the Petitioner and the said vehicle was released to the Petitioner. Though there are pending applications for revision, unless the same succeeds, the vehicle is now in the possession of the petitioner courtesy of a court order.

21. In this petition, the Petitioner seeks a declaration that the decision of the 1st Respondent's officer and 3rd Respondent to deprive the Petitioner, the vehicle No. KBB 002X contravened the Petitioner's freedoms and rights to title to property. From the evidence, the repossession of the said vehicle was at the instance of the complaint lodged by the interested party. That complaint is the subject of a criminal case that is still ongoing. To make a determination in this petition in the manner sought would have the effect of compromising the said ongoing proceedings. Accordingly, I decline to issue the said declaration.

22. The second order sought is an order restraining the Respondents from howsoever preventing the Petitioner from his peaceful possession of the vehicle No. KBB 002X the subject of this petitions. As already stated, the vehicle is now in possession of the Petitioner. As the issue of ownership of the said vehicle cannot be determined in this petition, this court cannot issue the said order. That position applies to the relief for a writ of prohibition prohibiting the Respondents whether by themselves or through any of their servants and/or agents or others whosoever from depriving the Petitioner of any of his property in the Petitioner's custody.

23. As regards damages for violation of the Petitioner's fundamental constitutional rights, no basis has been laid for granting damages.

24. Before concluding this matter, it is my view that the issues raised herein were purely civil in nature and ought not to have been elevated to violation of constitutional rights. In **Muiruri vs. Credit Bank Ltd & Another [2006] 1 KLR 385**, Nyamu, J held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution; for example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193**, Court the expressed itself as hereunder:

“We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on the point... Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn triviliase the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry... It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters... In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one... The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

25. Whereas every person is, pursuant to the provisions of Articles 3 and 22 of the Constitution, under an obligation to respect, uphold and defend the Constitution and a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:

“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

26. Therefore, it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

27. It is in that light that I understand the Court’s position in John Harun Mwau vs. Peter Gastrow & 3 Others [2014] eKLR that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

28. Similarly, in Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J (as he then was) held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

29. Accordingly, it was held in Jemimah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012 that:

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”

30. The rationale for this was given in Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011 where it was held that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true.....I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

31. I associate myself with the decision in Nation Media Group Limited vs. Attorney General [2007] 1 EA 261 to the effect that.

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

32. So, in General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR, Wendoh, J expressed herself as hereunder:

“The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so,

their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See Ben Kipeno & Others vs. AG Pet15/07 and Bahadur vs. AG (1986) LRC Const 297 where the court said;

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.”

In Speaker of National Assembly vs. Njenga Karume (1990-1994) EA 546 the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also Harrikisson vs. AG (1979) 3 WLR 63.”

33. Further afield, in NM & Others vs. Smith and Others (REEDOM OF Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC) the Constitutional Court of South Africa stated that:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

34. Similarly, in Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ held as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22).”

35. The judge added that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

36. Our own Supreme Court has clarified its position with regard to appeals filed in accordance with Article 163(4)(a) and in Peter Oduor Ngoge v Hon. Francis Ole Kaparo Petition No. 2 of 2012 declined to hear an appeal and stated:

“In the petitioner’s whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court...the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court.”

37. Subsequently, in Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board Petition No. 5 of 2012 the Court held that:

“...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”

38. As disclosed by the parties, there are other proceedings of criminal in nature whose subject is the same vehicle herein. Accordingly, in this decision I have avoided dealing with and making determinations whose effect may prejudice those proceedings. Constitutional petitions are serious matters which ought not to be treated as substitute for ordinary civil or criminal cases.

39. It follows that this petition fails and is dismissed but with no order as to costs.

40. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 25th day of February, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Obade for the Interested Party

CA Geoffrey