



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 5 OF 2019

IN THE MATTER OF ARTICLE 19, 20, 21, 22, 23 & 14 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION

AND

IN THE MATTER OF THE TRAFFIC ACT

BETWEEN

PARIS MUTWIRI JOHN.....PETITIONER/APPLICANT

VERSUS

THE BASE COMMANDER MAUA TRAFFIC BASE.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner is the owner of motor vehicle registration number KBR 876V Toyota Succeed which he avers was on 30th August 2016 impounded without any lawful cause by officers of the 1st Respondent attached to Maua Traffic Base. He claims that his right to own property as enshrined in Article 40 of the Constitution was violated and he has come to Court to seek for justice including compensation in the form of damages. Vide his Petition dated 19th February 2019, he seeks the following prayers: -

- a) A declaration that the Petitioner's right to own property under Article 40 has been infringed and an award of damages for infringement of his right.***
- b) A permanent injunction restraining the Respondents, their servants, agents or any other person acting on their behest, behalf or direction from unlawfully, illegally or arbitrarily taking, keeping and holding the Petitioner's motor vehicle registration number KBR 876V Toyota Succeed Chassis No. NCP58 – 0039499 Model No. CBA NCPF8G Toyota Navy Blue.***
- c) Damages for unlawful detention of the Petitioner's motor vehicle and damages for non-user.***

Petitioner's Case

2. The Petition was supported by the supporting affidavit sworn on 19th February 2019 and the Affidavit Evidence of the Petitioner sworn on 2nd March 2020. He also filed submissions dated 30th July 2019. He submits that following the unlawful impounding and detention of his vehicle by the officers of the 1st Respondent, his said vehicle kept wasting away despite his efforts to have it released to him. He avers that the Respondent's Officers frustrated his efforts and failed to offer any reasons for seizing the Petitioner's motor vehicle and that his right to

own property was thereby infringed and further that he suffered immense loss and damage due to these acts.

3. He submits that in a bid to have his vehicle released, he visited Maua Traffic Base on a daily basis but was turned down several times until when he was informed that the number plates of his motor vehicle had been removed and was referred back to KRA offices in Meru. He submits that for a period of 4 months, he was tossed back and forth and only on the 5th month was he informed that the registration plates had been found and he was required to collect them from the NTSA offices at Meru and that he repeatedly refused to do so, which fueled the officers to further impound the vehicle and they kept mocking him with harsh words. He submits that finally, the base commander at Maua asked for the ownership documents of the motor vehicle and he complied.

4. He submits that the vehicle had been in the station for more than 2 years at the behest of the police i.e from 30th August 2016 to 2nd April 2019. He submits that he has suffered stress and anxiety coupled with immense loss and damage due to non-user of the vehicle as the Petitioner's vehicle was a private vehicle which enabled him ease of movement and easy transfer of his far produce from Kiaraone to Mutuati market and that during the period his motor vehicle was impounded, he was forced to hire a motor bike as Ksh 800/= per day to enable him attend his daily routines at his farm.

5. He submits that his constitutional right to property was violated since his vehicle was impounded by the Respondent's agents and/or officer without preferring any charges against him for a period of 2 and a half years and the said vehicle kept wasting away and as such, the law was used unreasonably and unjustifiably as a result of which his rights were trampled on; He further submits that the Respondent's officer asked for a bribe in order to release his motor vehicle and said that if he did not want to sell his vehicle to them, he could as well do his 'very best' to have it released. He submits that he was mocked and was not charged with any traffic offence yet where a person commits a traffic offence, the law should be appropriately applied.

6. He submits that a right to fair hearing requires that any accused person has to be charged formally in Court and this should be done expeditiously without any delay. He submits that having impounded his vehicle, the officers had a duty to prove that the same was lawfully retained. He relied on the case of **HCC Petition No. 13 of 2015, Disarano Limited v Kenya National Highway Authority & the Attorney General (2017) eKLR**. He submits that failure to take any action made the detention for over 2 years unlawful and in contravention of the petitioner's rights to own property. He prays that the Court finds the Respondents' officers' actions and use of law capricious, arbitrary and whimsical for ill intent to threaten the Petitioner into submissions.

7. He further submits that his registration plate was removed with no indication of the plate were ever to be released, and for a period of more than 5 months he was tossed back and forth until when he finally got the number plates at Maua Traffic Base. He submits that he had right to use his motor vehicle and to do business and earn a living hence continued retention of his vehicle's registration plate is a serious violation of his right given the circumstances of the case. He relied on the case of **HCC Petition No. 369 of 2017, Joram Nyaga Mutegi v Kenya National Highway Authority (2017) eKLR**.

8. He submits that a wrong cannot go unpunished and it being that his vehicle was unlawfully seized for a period of over 2 years, and it being that no charges were pressed against him for any traffic offence, he is entitled to damages for wrongful detention of his vehicle. **He relies on the case of Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority (2009) eKLR** and he asks for damages of Ksh 2,000,000/- for the 2 and a half years. He also prays for damages for non-user it being that he was forced to hire a motor cycle at the rate of Ksh 800 per day in order to attend to his chores at the farm which amount to Ksh 720,0000/= for 2 and a half years. He also prays for costs and interests at court rates from 30th August 2016 when the vehicle was seized.

Respondents' Case

9. The Respondents opposed the application by way of grounds of opposition dated 3rd June 2019 based on the grounds that the Petitioner has not demonstrated to Court any breach of either the Constitution or any law on the part of the Respondent; That the Petitioner is guilty of inordinate delay in lodging the claim; That the orders sought are untenable in law since a claim for special damages for non-user must be pleaded and proved; That costs follow the event and the Respondent has demonstrated good faith by releasing a motor vehicle not pursued by the Petitioner for over 2 years; That the Petitioner has not laid any basis for the claim of loss of user and in any event, the Petitioner acquiesced to the loss.

10. They also filed submissions dated 20th July 2020. They submit that a party alleging that violation of rights must plead with reasonable degree of precision which rights were violated and the manner in which they were violated, contrary to what the Petitioner has done by merely listing articles of the Constitution. They submit that the Petitioner, despite submitting that his right to own property under Article 40 has been infringed, he approbated to the release of the motor vehicle which is the subject of the Petition and as such, prayers a and b of the Petition were dispensed with the moment the Respondents released to motor vehicle vide court orders dated 15th March 2019.

11. Concerning prayer c and d of the Petition, the Respondents submit that despite claiming that his vehicle was towed to Maua Police Station on 30th August 2016, the Petitioner never took any action and never filed a Petition until 19th February 2019, i.e over 2 years and as such, he is guilty of laches. They submit that delay defeats equity and no equitable relief should be granted where there has been delay.

12. They further submit that the Petitioner has not demonstrated to the Court the use of the vehicle in question and whether the vehicle was a public service vehicle or a commercial vehicle and that there is no documentary evidence of reports or financial statements whatsoever furnished before the Court to show that he had income from his going concern business and as such, it is clear that the Petitioner has not produced any single evidence to support his claim damages for non-user and that being in the nature of special damages, loss of user needs to be specifically pleaded and proved and as required by Section 107 of the Evidence Act.

13. They submit that for one to be compensated for damages in a Constitutional Petition, there must be a declaration that there is a violation of human rights by the Respondents and in this case, there is no such declaration and there will never be since the Petitioner approbated/conceded to the release of his vehicle by the Respondents before his claim was determined and therefore the instant Petition is

already determined. They pray that the Petition be dismissed with costs.

Issues for determination

14. The following two issues for determination rise in the instant Petition: -

i) Whether the Petitioner's right to own property was infringed.

ii) Whether the Petitioner is entitled to damages.

Whether the Petitioner's right to own property was infringed.

15. To begin with, the Respondent has raised a preliminary point of law, being that the Petitioner has failed to state with a degree of precision, the rights which have been violated and the manner in which the said rights have been violated but has merely listed various articles of the Constitution. This submission by the Respondent is informed by the holding in the case of *Anarita Karimi Njeru v R, Miscellaneous Criminal Application No. 4 of 1979*. However in the latter case of *Trusted Society of Human Rights Alliance vs. Attorney General and 2 Others [2012] eKLR*, the Court re-affirmed the holding in the Anarita Karimi Njeru case and stated that:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

16. The right to property which is mentioned severally the Petition is a substantial issue which this Court is able to fashion, and in the event of finding that the same was violated, this Court is able to remedy. Despite claiming that the Petitioner is guilty of laches, the Respondents have not alluded to any provision of law limiting the Petitioner's rights to bring the instant claim. The Court will therefore address the merits of the Petition.

17. The right to property as enshrined under Article 40 of the Constitution of Kenya is an elaborate one. Article 40 provides as follows: -

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description

(b) in any part of Kenya

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description, or

(b) to limit, or in any way restrict the enjoyment of any right under this Article

18. In the present case, it is not in dispute that the subject motor vehicle belonged to the Petitioner. Article 260 of the Constitution of Kenya defines 'property' as follows: -

‘property’ includes any vested or contingent right to, or interest in or arising from-

(b) goods or personal property.

19. The 1st Respondent's officer impounded the Petitioner's vehicle from 30th August 2016 until 15th March 2019. This fact is not contested. It is also not contested that the Respondents did not press any charges against the Petitioner relating to any traffic offence and/or any other offence. This is an indication that there was no valid reason for them to impound the vehicle.

20. From their response, the Respondents do not deny that the Petitioner's vehicle was impounded. The only point raised is that the Petitioner, having accepted the motor vehicle approbated his rights and the Petition should therefore fail.

21. This Court does not agree with the submissions made by the Respondents that the Petitioner approbated by accepting the motor vehicle.

The fact that the vehicle was released and the Petitioner accepted the same is not to be construed as waiver of his right to claim a violation of a right and fundamental freedom in the Bill of Rights. In any event, at the time of filing the instant Petition in February 2019, the vehicle had not been released. It was only released following issuance of this Court's orders of 15th February 2019 requiring that the same be released. Furthermore, by accepting the motor vehicle, the Petitioner was merely mitigating his losses but was not waiving his rights. As will be observed at a later part in this decision, the question of whether one mitigated his losses is relevant in determining the amount of damages awardable. Furthermore, the Petitioner went through the trouble of instituting the instant Petition to seek redress for violation of his rights and the Respondent cannot therefore claim that he waived his rights.

22. Further, it is on record that the Petitioner made numerous several visits almost every other two (2) weeks to Maua Traffic Base, enquiring for his vehicle but his efforts were always met with an excuse, including at one point being told that his number plates had been removed and that he should go and get them from the KRA and/or NTSA offices. Indeed, the Petitioner went through turmoil in his quest to have his vehicle back.

23. In the case of *Patrick Kamotho King'ori v Inspector General of Police & 4 others; Alice Chesang (Interested Party) Constitutional Petition Case No.12 of 2018 [2019] eKLR* Matheka J held as follows in a case where the Petitioner's motor vehicle had similarly been impounded arbitrarily: -

“The 5th respondent having failed to respond to the allegations of illegality on their part, leaves the petitioner's contention unchallenged. Hence the petitioner's right to own property and the right to fair administrative action was violated. Being in possession of the motor vehicle and having a log book that indicated he was the owner, the police officers who impounded the motor vehicle acted in violation of his rights as they ought to have carried out investigations to find out the true position of the matter before impounding the motor vehicle. In the circumstances of this case, despite the fact that the police may have had another document showing that the motor vehicle was registered in another person's name, they were not justified in simply taking the motor vehicle away from the petitioner. They were required to follow due process. The petitioner was never charged with any offence hence; it cannot be said that he had committed some crime in possessing the motor vehicle.”

24. This Court thus finds that there was indeed infringement of the Petitioner's right to property by the very act of impounding the Petitioner's motor vehicle without any lawful justification. This Court adds that the impoundment was arbitrary, and a direct contravention of the provisions of Article 40 (2) (a) of the Constitution.

Whether the Petitioner is entitled to damages.

25. Indeed, it has been said time and again that equity cannot suffer a loss without a remedy. Article 23 (3) of the Constitution of Kenya sets out the type of reliefs that a Court confronted with a matter touching on violation of rights may grant. These include among others, (e) an order for compensation.

26. In the case of In *Haji Asuman Mutekanga v Equator Growers(u) Limited (Civil Appeal No. 7 of 1995)* the Court when dealing with the issue of special damages noted thus: -

“...Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probability. This rule applies where a suit proceeds inter parties or ex parte. As the learned author stated in MC Gregor on Damages 4th Edition page 1028, the evidence in special damages must show the same particularity as is necessary from its pleading. It should therefore, normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. However with the proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts... General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. Its distinction from special damages was defined by Lord Wright in Monarch S.S. Co. V Karlshanus Oliefabriker (1949) AC, 196 at 221 as being: “damages arising naturally (which means in the normal course of things) and cases where there were special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event it is laid down that the special fact must be communicated by and between the parties.”

27. The Petitioner has claimed damages for loss of user. He states that he would use the vehicle for business as he is a farmer and he would use the vehicle to transport his farm produce from Kiraone to Mutuati market. As a consequence of the impoundment, he states that he was forced to hire a motorbike at Ksh 800/= per day to attend to his chores at the farm. He therefore seeks damages for non-user at the rate of Ksh 800/= per day for 2 1/2 years being Ksh 720,000/=. He also seeks damages for infringement of his right to own property and damages for unlawful detention.

28. In the case of *Moses Kipkoech Rotich v Kenya National Highways Authority & 7 others Petition No. 14 of 2016 [2018] eKLR* Mumbi Nguigi J held as follows: -

“52. The petitioner had also sought damages for loss of use. However, no evidence was tendered to support such loss. Being in the nature of special damages, loss of use needed to be specifically pleaded and proved, and there being no evidence in support thereof, I make no order with regard to such loss.”

29. A claim for loss of user is in the nature of special damages. Although at paragraph 15 of the Petition the claim for loss of user was pleaded, the Petitioner did not indicate the amount claimed. To this Court's understanding of the requirement to specifically plead means that the exact figure must have been pleaded alongside the heading. Further, the Petitioner ought to have specifically proved his claim for loss of user. He failed to provide any form of proof as to the amount of Ksh 800/= per day allegedly spent on hiring a motorbike. This Court understands the difficulty that there may be in proving evidence of use of a motor bike more so when the transactions may have been done in cash, however the strict nature of special damages does not allow this Court to award damages for loss of user without some form of

evidence. For these omissions, this claim fails.

30. For the claim of general damages for infringement of his right, the Petitioner has asked for Ksh 2,000,000/=. In the aforesaid case of ***Patrick Kamotho King'ori v Inspector General of Police & 4 others; Alice Chesang (Interested Party) Constitutional Petition Case No.12 of 2018 [2019] eKLR*** Matheka J awarded the Petitioner damages of Ksh 2,000,000/= where his vehicle had been impounded for about 10 months. In the case of ***Moses Kipkoech Rotich v Kenya National Highways Authority & 7 others Petition No. 14 of 2016 [2018] eKLR*** Mumbi Ngugi J awarded the Petitioner damages of Ksh 3,000,000 where his vehicle had been impounded for 10 months. In the 2014 decision of ***Daneva Company Limited v Kenya National Highways Authority [2014] eKLR Kasango J.*** awarded damages of Ksh.2,500,000/= for unlawful detention and seizure of a motor vehicle. In the case of ***Great Lakes Transport Co. (U) Ltd -Vs- Kenya Revenue Authority [2009] eKLR*** the Court of Appeal awarded damages of Ksh.500,000/= to an Appellant whose vehicle had been impounded for 6 months, however after considering the fact that the Appellant had done nothing to mitigate the loss.

31. This Court finds that an award of Ksh1,500,000/= would be adequate compensation for the breach of the Petitioner's rights considering the circumstances surrounding the case. The Court also considered that the Petitioner had a duty to mitigate his loss. In any event he did not prove loss of user as a special damage and he, is therefore, is not entitled to an award for any special damages.

Orders

32. In the end, this Court makes the following orders: -

i) A declaration be and is hereby issued that the Petitioner's right to own property under Article 40 has been infringed.

ii) A permanent injunction be and is hereby issued restraining the Respondents, their servants, agents or any other person acting on their behest, behalf or direction from unlawfully, illegally or arbitrarily taking, keeping and holding the Petitioner's motor vehicle registration number KBR 876V Toyota Succeed Chasis No. NCP58 – 0039499 Model No. CBA NCPF8G Toyota Navy Blue.

iii) The 1st and 2nd Respondents are jointly and severally liable to pay the Petitioner Ksh.1,500,000/= plus interests from the date of this Judgment until payment in full as compensation for breach of his Constitutional right to own property.

iv) The 1st and 2nd Respondents shall bear the costs of this Petition.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Muia Mwanza & Co. Advocates for the Petitioner

Ms. Mbaikyatta Darlive, Senior Litigation Counsel for the Respondents