



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 221 OF 2019

IN THE MATTER OF ARTICLES 22(1), 23, 25, 26, 27, 28, 29 & 40

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER THE BILL OF RIGHTS (CHAPTER 4 OF THE CONSTITUTION OF KENYA, ARTICLE 29) & ARTICLE 40 (PROTECTION OF RIGHT TO PROPERTY) & THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

EPHANTUS NDUHIU NDEGWAPETITIONER

-VERSUS-

MOSES NYAGA KIMATHI.....1ST RESPONDENT

OFFICE OF THE INSPECTOR GENERAL.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

PETITIONER'S CASE

1. The Petitioner's case is that he is the absolute and registered owner of Massey Ferguson Tractor registration number KTCB 345J; which he acquired from the 1st Respondent and transferred its ownership to him but petitioner avers he left it in the care, custody and control of the 1st Respondent pending collection at his convenience.
2. That in July 2017 when the Petitioner went to collect his tractor, he found that it had been moved to unknown location forcing him to report the matter of the missing tractor at Karatina Police Station. He also engaged the services of private investigators and together with police from Karatina Police Station they recovered the tractor in Nairobi on 1/3/2019 and towed it to his premises in Kileleshwa.
3. On 3rd April 2019, the Police from Karatina Police Station visited the Petitioner's premises allegedly at the behest of a third party unknown to the Petitioner, claiming the third party had bought the tractor from the son of the 1st Respondent and impounded and detained the tractor at Kileleshwa Police Station, where it is still lying to date.
4. The Petitioner contend that he has not been served with any notice of seizure and with exception of the verbal allegation by police, he is yet to be given written reasons and grounds for seizure of his property.
5. It is urged by the petitioner that the acts of police of detaining his tractor are without any plausible explanation or reason; is malicious and is calculated at arm-twisting the Petitioner in accede to relinquish and surrender his tractor either to the 1st Respondent or the undisclosed third party purchaser. It is further averred that the said detention of the tractor is without any basis or logic, as no one has been arraigned in court on charges relating to the said tractor and as matter stand now the police are silent on their investigations or intended cause of action, if any.
6. The Petitioner contend the nature and scope of the dispute is wholly and effectively governed by civil law and the involvement of the

police in a private matter is unconstitutional, criminal and oppressive.

7. It is urged in the circumstances, the Petitioner's right to own and enjoy his property and freedom from arbitrary harassment and intimidation, as guaranteed by the constitution of Kenya is now threatened and that it is in the interest of justice and fair play that the respondents are restrained from misusing that assumed / ostensible powers to perpetrate an illegality.

8. The petitioner in the instant Petition seeks the following prayers:-

a. That a declaration be and is hereby made that the Petitioner is the sole and absolute owner of Massey Ferguson Tractor registration number KTCB 345J, with full and unfettered rights of ownership and disposition as guaranteed in the Constitution of the Republic of Kenya.

b. That a declaration be and is hereby made that the interference by the police in the petitioner's ownership and enjoyment of his tractor registration number KTCB 345J amounts to an infringement on his right to private property, is unreasonable, unconstitutional and is tantamount to arbitrary and unlawful seizure.

c. That the Respondents, jointly and severally, be restrained, either by themselves, their servants, agents, assignees, or howsoever, and in particular any and all police officers from the National Police Service, from interfering with the Petitioner's quiet and peaceful enjoyment, ownership and possession of Massey Ferguson Tractor registration number KTCB 345J.

d. That the Respondents, and specifically the DCIO Karatina, the DCIO Kileleshwa, and all police officers under their command or authority, or any other police officer seized of the control and retention of Massey Ferguson Tractor registration number KTCB 345J, to forthwith, and in any event within no more than twenty four (24) hours of service of this order, release and surrender the said tractor, together with its keys, accessories and implements to the petitioner.

e. General Damages

f. An award for costs.

THE 1ST RESPONDENT'S RESPONSE

9. The 1st Respondent filed response to the Petition dated 5th January 2020. The 1st Respondent aver that he borrowed Kshs.300,000/= from the Petitioner and gave the petitioner a logbook of the tractor in question as security for the loan advanced to him by the petitioner. The 1st Respondent and the petitioner agreed and entered to sale agreement of the 1st Respondent's tractor at a purchase price of Kshs.1,500,000/=. The Petitioner was given the plough to keep after paying a deposit of Kshs,300,000/= and hold on to, it as a security pending payment of the balance of the full purchase price.

10. It is 1st Respondent's contention that the Petitioner breached the terms of the agreement by failing to pay agreed instalments, leading to party entering into an agreement in a bid to safeguard their life-long relationship/friendship, agreeing to transfer the logbook of the tractor into the petitioner's name so as to enable them take a loan with a bank and off-set the purchase price balance of Kshs.760,000/=.

11. The 1st Respondent aver that once the transfer of the tractor's logbook was effected into petitioner's name and handed over to him through the Respondent's son Kelvin Nyamu, the petitioner stopped payment of the purchase price balance claiming the tractor was his property but the 1st Respondent demanded payment of the balance of purchase price.

12. The 1st Respondent being not paid the balance of the purchase price held to the tractor upon realizing that the Petitioner had tricked him and misled him into transferring the logbook to his name and handing it over to him.

13. It is contended by the Respondent that the Petitioner reported him to CID Karatina, who refused to hand over the tractor to the Petitioner after realizing that this was a civil matter which needed to be settled in court.

14. The 1st Respondent assert that the Petitioner should not benefit from his unlawful acts and prays that the balance of his purchase price of Kshs.760,000/= be paid to him and that upon payment the Petitioner may keep the logbook. He seeks that the interest be paid to him.

THE 2ND AND 3RD RESPONDENTS RESPONSE

15. The 2nd and 3rd Respondents are opposed to the petition herein and have filed grounds of opposition raising the following grounds:-

a. That the 2nd Respondent is mandated vide Section 24 of the National Police Service Act, that provides for the functions of the police as "(a) provision of assistance to the public when in need; (b) maintenance of law and order; and (c) preservation of peace".

b. That further, Section 49(1) provides that; "subject to Article 244 of the Constitution and the Bill of Rights, a police officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred on or assigned to a police officer."

c. That the Petition only seeks to circumvent the mandate of the 2nd Respondent under the National Police Service Act and the Constitution of Kenya 2010.

d. That the petition filed herein is omnibus, imprecise and lacks sufficient detail of the alleged violations thus is in contravention of the principles espoused in the case of Anarita Karimi Njeru (1976-1980) KLR 1272.

ANALYSIS AND DETERMINATION

16. I have very carefully considered the petition, the grounds of opposition and the response herein as well as submission by the petitioner and the issues arising for considerations are as follows:-

a. Whether the Petition raises any constitutional issues for determination by this court?

b. Whether the 2nd Respondent exceeded their constitutional mandate in discharge of their functions?

A. WHETHER THE PETITION RAISES ANY CONSTITUTIONAL ISSUES FOR DETERMINATION BY THIS COURT?

17. The Petitioner in this Petition rely on his petition dated 6th June 2019. In his submissions he urges that he has adduced evidence that he is the bone fide and lawful owner of the tractor in question. He contends that no contrary evidence has been tabled to contradict the Petitioner's ownership of the tractor. The Petitioner seek to rely on *Section 8 of the Traffic Act* which provides:-

“The person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle.”

18. It therefore follows that registration per se is not proof of ownership as contrary evidence can be provided. In the instant Petition the 1st Respondent has demonstrated that the registration of the Petitioner as the owner of the questioned tractor was obtained through trickery and fraudulently means. The 1st Respondent claims he effected transfer on premise of the logbook being used to secure loan to enable Petitioner pay the 1st Respondent the balance of purchase price in full. It therefore follows there was a contract between the petitioner and 1st Respondent to sale and to purchase the tractor. This is in my view a commercial dispute raising no single constitutional issue for consideration by this Court.

19. The Petition as filed lacks sufficient details of the alleged violation of the Petitioner's Bill of Rights. I find that the Petition as drawn and filed has not set out details of contravention of the constitutional rights of the Petitioner as espoused in the case of *Anarita Karimi Njeru v. Republic (No.1) (1978) KLR 154* as affirmed by the *Court of Appeal* in the case of *Mumo matemu v. Trusted Society for Human Rights Alliance & 5 Others NRB CA Civil Appeal 290 of 2012 (2013) eKLR* where the court stated that:-

“A petitioner ought to set out his claim against the Respondent with a reasonable degree of precision.”

20. The instant Petition as filed ought to have pointed out the Articles of the Constitution violated and in what manner so as to make it possible for the Respondents to answer the claim and enable the Court adjudicate upon it. I find the Petition filed by the Petitioner does not disclose the Petitioner's rights allegedly violated and prayers being sought by the Petitioner are not amenable in law as they are tantamount to creating a contract between the petitioner and the 1st Respondent, which I find cannot be granted by this Court.

21. The Petition herein is in my view misconceived and an abuse of the Court process because the dispute between the Petitioner and the 1st Respondent is purely a commercial dispute which raises no constitutional issues as per framed and filed Petition. It is a frivolous and vexatious Petition.

B. WHETHER THE 2ND RESPONDENT EXCEEDED THEIR CONSTITUTIONAL MANDATE IN DISCHARGE OF THEIR FUNCTIONS?

22. The 2nd Respondent, the office of Inspector General, is under *Section 24 of the National Police Service Act* mandated to carry out functions as set out under the aforesaid Section, which include provision of assistance to public when in need and also ensure maintenance of law and order and preservation of peace. It is further provided under *Section 49(1) of the Act* that subject to *Article 244 of the Constitution* and the Bill of Rights, a Police Officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred or assigned to a police officer.

23. In the instant Petition the Petitioner in his Petition has not averred nor demonstrated that the 2nd Respondent acted contrary to its mandate or exceeded its mandate on that it did not act as per its functions under *Section 24 of the National Police Service Act* in assisting the public in need or failed to maintain law and order and further breached preservation of peace.

24. **Article 244 of the Constitution** sets out the objects and functions of the National Police Service as follows:-

“24. Objects and functions of the National Police Service

The National Police Service shall—

- a. strive for the highest standards of professionalism and discipline among its members;**
- b. prevent corruption and promote and practice transparency and accountability;**
- c. comply with constitutional standards of human rights and fundamental freedoms;**
- d. train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and**
- e. foster and promote relationships with the broader society.**

25. Upon considering the Petitioner's Petition in its entirety, it has not disclosed the function of the 2nd Respondent which they violated nor has it been demonstrated that the 2nd Respondent in discharge of its duties it failed to comply with the constitutional standards of human rights and fundamental freedoms in respect of particularized Articles of the Constitution. I therefore find the 2nd Respondent in exercise of their functions as prescribed by the Constitution did not exceed their mandate nor violated any right or fundamental freedoms in Bill of Rights against the Petitioner.

26. From the aforesaid I am satisfied that the petition raises no Constitutional issues as it is purely a commercial dispute between the Petitioner and the 1st Respondent. This matter should have been filed in a Commercial Court for hearing and determination. The 2nd Respondent was involved by the parties in the matter and has acted in exercise of its mandate as provided for under **Section 24 of the National Police Service Act** and I find that it is not for this Court, in view of its findings herein to determine the issue of who is entitled to the tractor but the proper court, once the matter is filed at the proper Court.

27. The upshot is that the Petition is without merits and is accordingly dismissed. Each party to bear its own costs.

Dated, Signed and Delivered at Nairobi on this 25th day of June, 2020.

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J. A. MAKAU

JUDGE