



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 15 OF 2019

IN THE MATTER OF NYERI CRIMINAL CASE NO. 1833 OF 2019

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 10, 40, 46 & 75 OF THE CONSTITUTION OF KENYA 2020

AND

IN THE MATTER OF EASTERN AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT

AND

BETWEEN-

GITUMA KAUMBI KIOGA..... PETITIONER

-versus-

KENYA REVENUE AUTHORITY..... 1<sup>ST</sup> RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....2<sup>ND</sup> RESPONDENT

JUDGMENT

[1] By a petition dated 17<sup>th</sup> October, 2019, the Petitioner sought declarations to the effect: -

a. That the 2<sup>nd</sup> Respondent has a strict liability under Article 46 of the Constitution to furnish any consumer with authentic information relating to registration records of motor vehicles to enable the consumer gain full benefit of the goods and protect their economic rights.

b. That 2<sup>nd</sup> Respondent is liable to compensate the petitioner and pay damages for injury or loss occasioned to the petitioner caused by the exercise of the powers conferred to it by the National Transport and Safety Authority Act as per section 25 of the said Act.

And: -

Orders of Judicial Review by way of: -

c. Certiorari to bring to court for purposes of quashing the criminal proceedings preferred by the 1<sup>st</sup> Respondent against the petitioner in Nyeri CMCCRC NO. 1833 OF 2019; and

d. Prohibition and or permanent injunction prohibiting and permanently restraining the 1<sup>st</sup> Respondent from charging the petitioner with any offense under the East African Community Customs Management Act, 2004 with respect to the subject matter herein;

**And: -**

- f. An order that cash bail in the sum of Kshs. 100,000 deposited in court vide receipt no. 494527 be released to the depositor forthwith;**
- g. General damages for breach of petitioner's rights as protected under Article 40(1) (2) and 46(b) (c) & (d) & (2) of the Constitution;**
- h. Special damages of Kshs. 1,380,000 being cost of the subject matter;**
- i. Loss of user of the subject matter at a daily rate of Kshs. 5000 until payment of the value of the car stated above;**
- j. Punitive and exemplary damages for malicious prosecution and exposure to ridicule and odium;**
- k. Costs of petition;**
- l. Interest on damages; and**
- m. Any other relief that the court deems fit to meet the ends of justice.**

[2] The petition was supported by a supporting affidavit and a further supporting affidavit sworn by the petitioner.

[3] The petitioner's gravamen is that, sometimes in March 2017, one Elijah Kimaita offered to sell to the petitioner motor vehicle registration number KCE 385Y, SUBARU OUTBACK, CHASIS TYPE BP9045981, ENGINE NO. DBA-D037085, GOLD COLOUR, MANUFACTURED IN 2008.

[3] The petitioner thereafter applied for a copy of records through the 2<sup>nd</sup> respondent's computerized motor vehicle registration system (Transport Integrated Management System) [TIMS] which returned the details of the seller as per the original logbook. The system did not reveal any caveat or encumbrances on the vehicle. The petitioner exercised further due diligence and obtained copies of the seller's identity card and PIN number and ran them through the 1<sup>st</sup> respondent's PIN Checker Portal to establish whether the seller was a registered tax payer. The system returned result that the seller was a registered tax payer.

[4] After the foregoing due diligence checks, the petitioner and the seller entered into an agreement for sale of the said vehicle on 17<sup>th</sup> March 2017. And, upon payment of the first instalment of Kshs. 380,000 he took possession of the vehicle but asked the seller to transfer the said vehicle in the name of Abigael Mwendwa as the petitioner's identity card had been misplaced. The petitioner paid a further instalment of Kshs. 400,000 and the vehicle was transferred to Abigael. He then approached his bank for a loan facility to pay off the balance of Kshs. 600,000. The loan was approved on 21<sup>st</sup> June 2017 and the vehicle was duly charged as security thereof. He was reliably informed that the Bank also conducted due diligence before approving the loan. The vehicle was thereafter transferred to the petitioner upon payment of transfer fee to the 2<sup>nd</sup> respondent. The encumbrance was duly registered as chattels mortgage and duly noted in the 2<sup>nd</sup> respondent's computerized motor vehicle registration system. A log book was also duly issued in the joint names of the petitioner and the bank. The TIMS record also show this registration of ownership and encumbrance.

[6] But, on 19<sup>th</sup> September 2019, officers from the 1<sup>st</sup> respondent came to Meru upon consensus with the petitioner to verify whether the subject motor vehicle was among the list of vehicle alleged to have been diverted into the country illegally. After tape lifting the details of the subject vehicle, the said officers confirmed that the vehicle was in the list of vehicles suspected to have been fraudulently registered and therefore uncustomed for taxes had not been paid to the 1<sup>st</sup> respondent. The subject vehicle was detained at Meru Police Station on 19<sup>th</sup> September 2019 upon instructions by the said officers of the 1<sup>st</sup> respondent. The following day, the petitioner was summoned by the Revenue Protection Services Department at Nyeri where he recorded a statement and provided them with all documents relating to the vehicle. According to the petitioner, the said officers undertook to carry out comprehensive investigations on how the vehicle whose details were authenticated by the TIMS, registered and log book issued indicating taxes had been paid could be suspected to be uncustomed.

[7] The petitioner was again summoned at the 1<sup>st</sup> respondent's office at Nyeri on 4<sup>th</sup> October, 2019 where he was given summons to appear in court at Nyeri on 9<sup>th</sup> October, 2019 to take plea. He availed himself in court in accordance with the summons only to be summoned by the officers of the 1<sup>st</sup> respondent at the police station in Nyeri where he was released on cash bail of Kshs. 20,000 with summons to appear in court on 11<sup>th</sup> October, 2019. He took plea on 11<sup>th</sup> October, 2019 and pleaded not guilty to the main and alternative charge of interfering with goods subject to custom control contrary to section 203(f) and being in possession of restricted goods contrary to section 200(d)(ii) of the East African Community Customs Management Act, 2004 respectively.

[8] According to the petitioner, the officers of the 1<sup>st</sup> respondent insisted on stringent bond terms for the petitioner terming the crime to concern tax evasion which was a matter of public interest. The court released him on bond of Ksh. 200,000 or cash bail of Kshs. 100,000.

[9] As a consequence of the said charges, the media house with national coverage reported the incidence in social as well as print media in more than two occasions depicting the petitioner as a tax evader and on trial for diverting into the country a motor vehicle destined for Uganda. The malicious prosecution caused him great mental as well as emotional anguish. The defamatory publications caused him odium and ridicule.

[10] In light thereof, the petitioner averred that the actions by the 1<sup>st</sup> respondent to arbitrarily detain the vehicle and charge the petitioner in

court are malicious, unconstitutional, illegal and wholly meant to cover and protect the corrupt public officers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents who registered the vehicle, stored and disseminated information on the vehicle to unsuspecting citizens. Accordingly, their actions constitute infringement of his constitutional rights and freedoms. The petitioner considered himself to be an innocent consumer with rights under Article 46 of the Constitution to authentic and true information to enable him get full benefits of goods and services. He could only rely on the information held and disseminated by the 2<sup>nd</sup> respondent on the subject vehicle to be authentic. Disowning information held, processed and disseminated by them is a breach of his consumer rights guaranteed in article 46 of the Constitution. Allowing entry and registration of restricted and uncustomed goods in the country can only be to prejudice of innocent consumers including the petitioner which is a breach of citizens' consumer rights as well as the national values and principles of governance which binds all state organs and state officers. See article 10 of the Constitution. Such acts also compromise the integrity of state officers, thus, a breach of Article 75(1) of the Constitution. In addition, the detention of the subject vehicle is arbitrary deprivation of petitioner's right to property under article 40(2) of the Constitution. The bail deposit and travel to Nyeri for the criminal case is causing him financial strain.

### **Respondents' case**

[12] The 1<sup>st</sup> Respondent's replying affidavit was sworn by Morris Mbabu, an officer appointed pursuant to section 13 of the Kenya Revenue Authority Act (herein after KRA Act), Cap. 469 Laws of Kenya. He averred that, amongst its mandate, the 1<sup>st</sup> respondent enforces the East African Community Customs Management Act under First Schedule to the KRA Act. He also deposed that KRA has been experiencing problems in collection of taxes due to various illegal schemes including smuggling of goods across borders, under declaration of goods at border or entry points, manipulation of invoices and use of fraudulent receipts. He also set out the functions of the 1<sup>st</sup> Respondent as contained in section 236 of the KRA Act. In exercise of the said mandate, the 1<sup>st</sup> respondent carried out investigations on the matter and he compiled a list of vehicles including the subject vehicle herein in respect of which he had reasonable cause to believe that taxes had not been paid. On 31<sup>st</sup> July 2019, the 1<sup>st</sup> respondent raised all OCS countrywide to help in the tracing of the uncustomed vehicles. On 19<sup>th</sup> September, 2019 the officers of the 1<sup>st</sup> respondent received intelligence reports that the subject vehicle was spotted in Meru. The officers of the 1<sup>st</sup> respondent went to Meru and the petitioner was summoned at Meru police station where he was required to explain the status of the vehicle and also take it for inspection. The investigators carried out a tape-lift and it was established that the vehicle is one of the vehicles in the list as being uncustomed.

[13] He averred that the petitioner produced different agreements of sale of the subject vehicle. The agreements are annexed to the affidavit. He deposed further that it was established from its simba system that taxes had not been paid on the vehicle. He believed that it was the duty of the petitioner to provide them with proper documentation on the taxes paid on the vehicle which failure he takes to be a ploy by the petitioner to frustrate collection of taxes by the 1<sup>st</sup> respondent. Investigations revealed that the petitioner committed the offence of interfering with, and being in possession of goods under the control of Customs contrary to section 203 and 200 of the EACCMA Act, respectively. The petitioner was then charged accordingly. The vehicle was also detained and due documentation were issued to the petitioner.

[14] According to him, the petitioner was afforded opportunity to be heard before he was arraigned in court and therefore the request to quash the criminal proceedings is in bad faith and an attempt to avoid prosecution. He beseeched the court to consider the circumstances of the case and balance rights of all parties. According to him tax evasion is a matter of public interest which outweighs the private interests of the petitioner. He is also aware that the Constitution states that enjoyment of rights should not prejudice rights of others. He asked the court to decline the petition.

[11] The 3<sup>rd</sup> Respondent filed grounds of opposition and its major objection is that the petition contravenes article 157 of the Constitution, and the AG cannot give directions to the DPP who exercises his authority independent of control, direction or influence by any other organ or person. In addition, the trial court is best placed to evaluate the evidence being placed before this court. And, in any event, should he be dissatisfied with the decision of the trial court he has the options of review or appeal thereto. Accordingly, the AG sees this petition as premature for the trial is pending and also misdirected to the AG.

[15] The 2<sup>nd</sup> Respondent filed a replying affidavit sworn by CHRISTOPHER WANJAU, DIRECTOR OF REGISTRATION AND LICENSING in the 2<sup>nd</sup> respondent. He averred that they inherited data including data on duty as well as Vehicle Management System (VMS) from the 1<sup>st</sup> respondent until recently they installed their own system, the TIMS and moved all motor vehicles processes. They only register and issue registration numbers to motor vehicle upon payment of the requisite duty and taxes to the 1<sup>st</sup> respondent. According to him, currently, the TIMS cannot allow a vehicle to be registered as it pulls data from Integrated Customs Management System (ICMS) which belongs to the 1<sup>st</sup> respondent. According to the records of the 2<sup>nd</sup> respondent, the subject vehicle was registered through VMS in 2015 which was inherited from the 1<sup>st</sup> respondent upon confirmation that duty had been paid and remitted. He attached copy of the subject vehicle history as per the VMS as annexure CW-1. Prior to establishment of TIMS, searches on motor vehicles were done through VMS. He searched VMS which is still partly operational during the transition and obtained the status of duty on the vehicle as duly paid. He also stated that it was the duty of the 1<sup>st</sup> respondent to advise them of the status of duty on the subject vehicle as their record which they inherited from the 1<sup>st</sup> respondent shows the duty as Paid.

[15] Morris Mbabu filed a further affidavit on 3<sup>rd</sup> August 2020 on behalf of the 1<sup>st</sup> respondent. The affidavit was subject to a serious contestation. The court however allowed it to be deemed as duly filed. The deponent sought to discount the annexure in the petition- 12(a). He averred that the document does not relate to the motor vehicle subject of this petition. He stated that GCSB12473/14 issued for the petitioner's vehicle is yet to be cancelled. He explained that the Bond is usually raised when goods are received in the country by the 1<sup>st</sup> respondent and is cancelled once the goods has left the country to their destination. He annexed documents to show that the vehicle was meant to be in transit to Uganda and so he believed the vehicle was uncustomed goods meant for transit to Uganda, thus, legally subject of forfeiture under section 213 and 214 of the EACCMA Act.

### **Submissions**

[16] Parties filed submissions to reinforce their respective positions on the petition. The petitioner largely reiterated the contents of the

petition and the supporting affidavit. He, however, emphasized that the 1<sup>st</sup> and 2<sup>nd</sup> respondents either through negligence or actuated by corrupt dealing; abdicated their core mandates and functions by allowing substandard and uncustomed goods to be registered in the country, thus, offering such goods for local consumption. As a consequence, they prejudiced his consumers and property rights guaranteed under article 46 and 40 of the Constitution, respectively. He saw his prosecution as malicious for he is an innocent consumer of information provided by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their official forums. It was his submission that it was not explained how such good was registered and released to the consumers. His position is that the vehicle was made available to the consumers after it was registered and indicated duty paid. The vehicle was also assigned a number plate and log book was issued thereto. These documents duly certified the details and particulars of the good as well ownership thereof. His view was that this was not any coincidence but an infraction underpinned by pure compromise of official duty by officers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He wondered why the 1<sup>st</sup> respondent is not interested in investigating the clearing agent and the first registered owners of the subject vehicle yet their details are clearly captured in their systems. His conclusion was that the actions and omissions by the 1<sup>st</sup> respondent is a conspiracy to defraud the state and the citizenry and to conceal corrupt practices by their officers.

[16] The petitioner buttressed the need for courts to promote the spirit, purport and objectives of the Bill of Rights when interpreting the Constitution or any law. He also urged the need to build jurisprudence and in so doing consider other contemporary jurisprudence. He cited section 115 of the Indian Evidence Act which define estoppel. He stated that the parameters of doctrine of estoppel was expounded in the case of Chhaganlal Keshav Mehta –vs- Patel Naranda Haribhai [1981] AIR 121 to be: -

a. ....

b. ....

[16] According to the Petitioner, estoppel cures the mischief of occasioning injury to an innocent person who has relied on information provided by another. He relied on section 25 of the NTSA Act which states that nothing in the Act shall relieve NTSA from liability to compensate injury caused by exercise of the power in the Act. He urges the court to find the 1<sup>st</sup> and 2<sup>nd</sup> respondents liable for the breach of his rights and loss of his property. m liable for his injury. He also urges the court to issue estoppel against the 1<sup>st</sup> and 2<sup>nd</sup> respondents given their actions.

[17] He did not stop there; he insisted that the actions by the 1<sup>st</sup> respondent to charge him with criminal charges could only be malicious in order to tarnish his image. He claimed for damages.

[19] The 1<sup>st</sup> respondent substantially reiterated the averments in the replying and further affidavits filed herein. They however framed the issues they deem to fall for determination to relate to: constitutional threshold of petitions; detention of the subject vehicle; and the potency of reliefs sought. According to the 1<sup>st</sup> respondent, the petitioner has not demonstrated with precision failure on their party to perform a statutory duty. They were of the view that the claims in the petition was misdirected to the 1<sup>st</sup> respondent as the mandate of registration of motor vehicle, keeping of records and information on motor vehicle vests in the 2<sup>nd</sup> respondent. Similarly, the petition is not drafted with particularity required in law. They cited the cases of Anarita Karimi, Stephen Nyarangi and Mumo Matemu to support this argument.

[19] The 1<sup>st</sup> respondent also posit that they did not allow entry of uncustomed goods as alleged as the Customs Entry form dated 17<sup>th</sup> November 2015 clearly show the vehicle was imported by Samuel Kaeirye of Kampala and that the vehicle's destination was Uganda. It was therefore in transit to Uganda. According to them the vehicle is uncustomed goods, thus, as it was found in the custody of the petitioner, and the petitioner did not also provide evidence of payment of duties; he cannot claim violation of rights or loss of property or malicious prosecution. Accordingly, the petitioner was charged in court with disclosed criminal offences under section 200 and 203 of EACCMA Act. Equally, forfeiture of such uncustomed goods is lawful in accordance with section 200 and 210 of the EACCMA Act. They cited the cases of Godfrey Ngumo, Henry Wanyama and Allen vs. Gulf Oil to support the forfeiture of the goods, and Ex Parte Abdi Gulet Olus to support that they acted within their statutory mandate. It was their argument that the matters complained of in these proceedings were done pursuant to their mandates under article 209 and 210 of the Constitution and the EACCMA Act.

[19] The 1<sup>st</sup> respondent claims that the documents filed with the petition do not relate to a motor vehicle. In particular, annexure 12(a) relates to a different thing altogether from the issue in the petition. They urged that the fact that the Custom Bond has not been cancelled means that the vehicle is still in the country. The diversion of the vehicle into the country caused loss of revenue amounting to Kshs. 574,139.

[20] In sum, they submitted that the petitioner did not prove that the process of court was abused. Thus, there is no basis of quashing the criminal proceedings. They cited the case of Rosemary Wanja Mwangi & 2 Others vs. AG [2019] eKLR, and Ex Parte Kenneth Kariuki Githii [2014] eKLR.

## **ANALYSIS AND DETERMINATION**

### **Issues**

[21] In these proceedings, the following issues fall for determination by the court;

a. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated the consumer as well as property rights of the petitioner;

b. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated the core values and principles of governance, and integrity and leadership provisions as provided in law; and

c. Whether the petitioner is entitled to the reliefs sought.

[23] The above issues are inextricable in nature and repetition may become necessary during the analysis thereof or so as to lay emphasis on the pertinent legal arguments presented before the court.

### **Consumer rights**

[22] I understand the petitioner to be saying that he conducted official search on the subject motor vehicle from TIMS- the official portal of the 2<sup>nd</sup> respondent on motor vehicle registration- which returned the result that the vehicle is duly registered in Kenya and duty thereof duly paid. He believed this information to be authentic and true status of things in respect of the subject vehicle. In reliance on this information, he bought the subject motor vehicle. Thereafter, the vehicle was taken and detained by the 1<sup>st</sup> respondent; and he is now facing two criminal charges of interfering with goods under the control of Customs and being in possession of uncustomed goods in NYERI CMCCRC NO OF 2019. One of his complaints is that his right to information necessary to get full benefit of goods and services was violated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in storing and providing information on the subject motor vehicle for use by the public; on which he relied to his detriment in the purchase of the subject motor vehicle.

[26] Article 46 of the Constitution provides that: -

#### **46. Consumer rights**

##### **(1) Consumers have the right—**

- (a) to goods and services of reasonable quality;**
- (b) to the information necessary for them to gain full benefit from goods and services;**
- (c) to the protection of their health, safety, and economic interests; and**
- (d) to compensation for loss or injury arising from defects in goods or services.**

##### **(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.**

##### **(3) This Article applies to goods and services offered by public entities or private persons.**

[23] Inter alia, the purpose of the Consumer Protection Act is improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior. The petitioner decries that he relied on official information provided by the 2<sup>nd</sup> respondent to his detriment. The 2<sup>nd</sup> respondent stated that the information held by them on the subject vehicle is as was inherited by them from the 2<sup>nd</sup> respondent through VMS. According to Christopher Wanjau the document he annexed in his affidavit is the true reflection of the details of the vehicle in the system. This document contains similar information as annexure 12(a) annexed to the petition. The document bears the logo of the 1<sup>st</sup> respondent which renders credence to the averments by Mr. Wanjau that VMS is still partially in use as they migrate to TIMS. VMS was the 1<sup>st</sup> respondent's system. Mr. Mbaabu has attempted to bring confusion in these proceedings through his further affidavit sworn on 30<sup>th</sup> of July 2020 when he stated that annexure 12(a) in the petition does not relate to motor vehicle registration number KCE 385Y but is a different thing altogether. Yet;

(1) The 2<sup>nd</sup> respondent who is legally the custodian of registration details of the vehicle stated otherwise; see section 4(2)(a) of the NTSA Act that: -

##### **(2) In the performance of its functions under subsection (1), the Authority shall—**

##### **(a) register and license motor vehicles;**

And;

(2) A reading of the two documents reveal that the two documents; the one annexed to the petition and Mr. Wanjau's affidavit; relate to motor vehicle registration number KCE 385Y, Chassis number BP9-045981, Make Subaru. These details and description match the subject motor vehicle herein. The document show that the duty is paid- a matter that was confirmed by Mr. Wanjau.

[28] The state of affairs as they have revealed themselves leave a lot to be desired- I see a kind of passing the buck or simply covering ones back. Mr. Mbaabu seems to be treating this matter as a trifle yet it is serious matter involving tax evasion. He confessed that the 1<sup>st</sup> respondent is facing huge challenges in the collection of taxes and duties due to stealth maneuvers by tax evaders. He stated that he carried

out thorough investigations in the matter and established that the subject vehicle was uncustomed. One wonders, however, how such thorough investigation conducted by Mbaabu did not also focus on how such uncustomed motor vehicle was diverted into the country, registered and indicated that duty has been paid, and by whom. The petitioner claimed that the 1<sup>st</sup> respondent is not interested in unraveling the corrupt practices by the officers of the 1<sup>st</sup> respondent in a scheme to divert and register uncustomed motor vehicles in Kenya as duty-paid for vehicles. I do not think these claims by the petitioner are unfounded or a result of hallucinations or delusion. It bears repeating that Mr. Mbaabu dismissed the record produced by the official custodian of registration details of motor vehicles without any substantiation or reasonable explanation. On the one hand, the 2<sup>nd</sup> respondent through its director stated that the 1<sup>st</sup> respondent is the one to provide status of duty on motor vehicles including the subject motor vehicle. On the other hand, the 1<sup>st</sup> respondent claims that the 2<sup>nd</sup> respondent is the one with statutory mandate register motor vehicles. Be that as it may, it is surprising that since the first registration of the vehicle, the 1<sup>st</sup> respondent did not move with speed pursuant to its investigative mandate to provide correct information on the tax status on the vehicle. It is also most disturbing that Mr. Mbaabu confidently stated that the Bond issued to the importer on 17<sup>th</sup> November, 2015 is yet to be cancelled which means that the vehicle is still in the country. Who is supposed to cancel the Bond or follow through to ensure the Bond is cancelled after expiry of time provided. Needless to state that to an astute and efficient investigator, these matters are actionable. That aside, I see nothing on which to disbelieve the petitioner's arguments that there is possibility that some officers of the 1<sup>st</sup> respondent have compromised the integrity of their offices in breach of National Values and Principles of Governance as well as principles on integrity provided in Article 10, Chapter Six of the Constitution, Leadership and Integrity Act, Public Officer Ethics Act to mention but a few. I so find. These complaints by the petitioner are grave matters of public interest and are fit for investigations by the Ethics and Anti-Corruption Commission (EACC). I direct this judgment to be served upon EACC which is the constitutional body mandated to enforce provisions on integrity and anti-corruption in Kenya.

[29] In sum, the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed in their statutory duties to keep, maintain and disseminate reliable, accurate and correct information on the subject motor vehicle. Such service provided by public or state organs should be verified so that innocent consumers will not be prejudiced when they rely upon it. In this case, the petitioner relied upon information provided by official sources and platforms maintained by public organs to his detriment. The information provided guaranteed that the vehicle was without encumbrances, thus, making innocent purchasers like the petitioner to buy uncustomed vehicles. Accordingly, his right to information necessary to gain full benefit of goods and services was violated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The two respondents are therefore estopped from denying the correctness, accuracy and authenticity of the information they held out as accurate and correct through their official portals.

#### **Uncustomed goods**

[24] Mr. Mbaabu averred that, inter alia, the 1<sup>st</sup> respondent enforces the East African Community Customs Management Act under First Schedule to the KRA Act. He also deposed that KRA has been experiencing problems in collection of taxes due to various illegal schemes including smuggling of goods across borders, under declaration of goods at border or entry points, manipulation of invoices and use of fraudulent receipts. He also set out the functions of the 1<sup>ST</sup> Respondent as contained in section 236 of the KRA Act. In exercise of the said mandate, the 1<sup>st</sup> respondent carried out investigations on the matter and he compiled a list of vehicles including the subject vehicle herein in respect of which he had reasonable cause to believe that taxes had not been paid. He produced documents to show that; (a) the vehicle was in transit to Uganda; and (2) duty and taxes had not been paid in respect of the subject motor vehicle. Accordingly, the vehicle is uncustomed goods and liable to forfeiture in accordance with the EACCMA Act. The due procedure provided in the EACCMA Act for forfeiture of uncustomed goods should however be strictly adhered to. This finding is important in my analysis of right to property and reliefs sought.

#### **Right to property and reliefs sought**

[23] Uncustomed goods may not confer proprietary rights upon a person who buys such goods. Be that as it may, in this case, the petitioner was misled into buying uncustomed goods by the official information he obtained from the 2<sup>nd</sup> respondent. Notably, information on payment of tax and duties on a vehicle is provided by the 1<sup>st</sup> respondent. By this induced purchase of uncustomed goods in question, the petitioner suffered loss and damage. He is therefore entitled to damages to cover the purchase price and loss of user.

#### **Certiorari**

[30] The petitioner claims that he bought the subject motor vehicle from one Elijah Kimaita. He has tendered agreements for sale to that effect. He explained that he asked the seller to register the vehicle in the name of Abigail Mwendwa as his Identity Card had been misplaced. Both agreements were provided to the court; the 1<sup>st</sup> respondents also have copies. The 1<sup>st</sup> respondent seems to say that they became suspicious as to why there are two sets of agreements for sale in respect of the same vehicle. But, that alone is not sufficient to constitute reasonable suspicion that a crime has been committed. A prudent investigator is always guided by this legal threshold in preferring charges. The petitioner has explained the sequence of and reason for the transactions on transfer of the vehicle to Abigail and then to him. The latter was to enable him obtain a loan to service the balance of the purchase price. It would not have been difficult to reconcile the issue had the investigator set out to gather information from the petitioner, Abigail and Elijah Kimaita on the agreements for sale herein.

[31] It appears from what I have observed above, an attempt to conceal neglect of duty, breach of national values and principles of governance and integrity stated in article 10 and chapter six of the Constitution is more probable than not responsible for the criminal proceedings against the petitioner. I am aware that courts should not stop criminal trial except where the criminal trial is being used for purposes other than bringing the accused to justice or oppressively. In this case, I find that the proceedings against the petitioner were not brought for purposes of vindicating the law. Accordingly, such proceedings are liable to be stopped or quashed.

#### **Injury to reputation**

[32] The evidence shows the criminal charges against the petitioner were publicized in the media with nationwide coverage. From the findings above, the officers of the 1<sup>st</sup> respondent acted maliciously fully aware that their actions would hurt the reputation of the petitioner who is an advocate of the High Court of Kenya.

[33] None of the parties submitted on damages payable in respect of injury to the petitioner's character and reputation as an advocate arising from the malicious acts by the 1<sup>st</sup> respondent. But, as I have found, I have no doubt that the plaintiff was injured in his reputation as an advocate of considerable standing. An advocate depends on his professional reputation for his career and livelihood out of his business as such advocate. Injury to his reputation as an advocate is therefore a serious matter. On this, I am content to cite **John v MGN [1996] 3 W L R 593 at 607**, where Bingham, MR stated:

***“The more closely it [the defamation] touches the plaintiff's integrity, professional reputation, honour, courage, loyalty and the core attributes of this personality, the more serious it is likely to be”***

[34] There is no set formula for assessing damages for such injury. It all depends on the circumstances of each case and the good sense of fair compensation thereto. Courts, therefore has been guided by past comparable cases of similar nature. Huge sums of damages have been awarded to defamation of advocates. See the following cases.

[35] In **Samuel Ndungu Mukunya v Nation Media Group and Another [2016] eKLR** the plaintiff was awarded Kshs 20,000,000/-. The circumstances of that case are far more egregious than in the present case. In **J P Machira v Wangethi Mwangi and Nation Newspapers Nairobi HCCC No 1709 of 1996**, the plaintiff was awarded 10,200,000/= in 2001. In **Daniel Musinga v Nation Newspapers Ltd Mombasa HCCC No 102 of 2000**, the plaintiff was awarded Kshs 10,000,000/= in May, 2005. In **CK Kariuki v the Standard Ltd and Association of Kenyan Insurers Meru HCCC No 5 of 2000** the successful plaintiff was awarded global damages of Kshs 20,000,000/= in 2001.

[35] In assessing damages, I have considered the nature of the publications complained of. I am of the considered view that a sum of Kshs. 2,000,000 is fair and reasonable compensation for injury to his reputation. I so award.

### **Conclusions: Declarations, findings and Orders**

[34] In sum, I find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have a strict obligation under Article 46 of the Constitution and the Consumer Protection legislation to furnish consumers with authentic information relating to registration records of motor vehicles and payment of duty and tax on motor vehicles to enable the consumer gain full benefit of the goods, services and protect their economic rights. It turned out that the information on the subject motor vehicle provided through the official portals as inherited from the 1<sup>st</sup> respondent, and developed further by the 2<sup>nd</sup> respondent was incorrect or erroneous. Upon reliance of the said information the petitioner bought the subject motor vehicle in honest belief that it was without any defect; and suffered loss of the purchase price and user of the vehicle. Accordingly, I declare that the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated the petitioner's consumer rights as well as property rights guaranteed under article 46 and 40 of the Constitution, respectively. He is entitled to recover the purchase price of Kshs. 1, 380,000 and loss of user for 1 month at the sum of Kshs. 5000 per day as he is expected to mitigate his loss. Accordingly, I award the petitioner a sum of Kshs. 1,380,000 as special damages and Kshs. 150,000 for loss of user.

[36] In light of the facts of this case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are jointly and severally liable to compensate the petitioner and pay damages for injury or loss occasioned to the petitioner due to the exercise of or omission to diligently exercise the powers conferred upon the two bodies by statute and common law. The 2<sup>nd</sup> respondent is liable under section 25 of the National Transport and Safety Authority Act. I so find and hold.

[37] I find that the criminal proceedings in Nyeri CMCCRC NO. 1833 of 2019 was instituted with purposes other than bringing the petitioner to justice. It is being used oppressively and maliciously by the. Accordingly, I grant orders of Judicial Review by way of: (2) Certiorari to bring to court for purposes of quashing the criminal proceedings preferred by the 1<sup>st</sup> Respondent against the petitioner in Nyeri CMCCRC NO. 1833 OF 2019; and (2) Prohibition restraining the 1<sup>st</sup> Respondent from charging the petitioner with offenses forming part of NYERI CMCCRC NO. 1833 OF 2019.

[39] I order that cash bail in the sum of Kshs. 100,000 deposited in court vide receipt no. 494527 be released to the depositor forthwith;

[40] I award General damages for breach of petitioner's rights as protected under Article 40(1) (2) and 46(b) (c) & (d) & (2) of the Constitution as well as for injury to his reputation in the sum of Kshs. 2,000,000;

[41] Costs of petition; interest on general and special damages;

[42] The subject motor vehicle whose details are: KCE 385Y, SUBARU OUTBACK, CHASIS TYPE BP9045981, ENGINE NO. DBA-D037085, GOLD COLOUR, MANUFACTURED IN 2008 is uncustomed vehicle and should be dealt with strictly with the forfeiture procedures in the EACCA Act and a report be filed in court within 30 days of today to confirm forfeiture has duly been carried out to avoid another round of mischief by the officers of the 1<sup>st</sup> respondent.

[43] This judgment be served upon Ethics and Anti-Corruption Commission (EACC). It is so ordered.

**Dated, signed and delivered at Narok through Teams Application this 23<sup>rd</sup> day of November 2020**

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**F. GIKONYO**

JUDGE