



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 370 OF 2017

ANDREW OKOTH ONANDA.....PETITIONER

VERSUS

OFFICER COMMANDING STATION,

CENTRAL POLICE STATION, NAIROBI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. **Andrew Okoth Onanda**, the petitioner, is the registered owner of motor vehicle registration No, KBV 440H, the foundation of this petition. He filed the petition against the Officer Commanding Central Police Station, Nairobi and the Attorney General, the 1st and 2nd respondents respectively. The petitioner avers that his fundamental rights and freedoms guaranteed under Articles 27, 28, 47 and 50 of the constitution were infringed and violated.

2. According to the Petition amended on 21st November 2017, the petitioner contends that his motor vehicle was unlawfully detained at Central Police Station, Nairobi. It is the petitioner's case that, on 20th July 2017, he was arrested by three police officers from central police station and made him to drive the vehicle to the police station where he parked it at the police officers' request and handed the keys to them. The petitioner was then informed that he was under arrested for obtaining money by false pretence.

3. The Petitioner states that he was released on 22nd July 2017 on a cash bail of 20,000 but the police refused to release his motor vehicle thus deprived him of the lawful use of his motor vehicle. The petitioner contends that the detention of his motor vehicle is illegal, unlawful, and wrongful and in breach of his fundamental rights and freedoms enshrined in the constitution. The petitioner therefore filed this petition seeking the following reliefs;

a) A declaration that the petitioner's rights as guaranteed by articles 27, 28, 40 and 47 of the constitution of Kenya, 2010 have been contravened.

b) A declaration that the respondent's wanton and egregious act of seizing and detaining the petitioner's motor vehicle registration number KBV 400H violated his fundamental rights and freedoms as guaranteed under articles 1 and 17 of the universal declaration of human rights; Article 5 and 14 of the Banjul charter and article 2 of the international covenant on civil and political rights.

c) An order directing the OCS, central police station, Nairobi to release to the petitioner motor vehicle registration no. KBV 400H forthwith and unconditionally.

d) Compensation by way of damages for loss of user, illegal and unlawful detention of the petitioner's motor vehicle.

e) Cost of the petition

f) Any other further relief as this honourable court may deem fit and just to grant.

Respondents' response

4. The respondents filed grounds of opposition dated 16th August 2017, contending that the petitioner had not demonstrated with precision how his fundamental rights under Articles 40 and 47 of the Constitution were contravened; that the motor vehicle was lawfully impounded on suspicion of aiding and abetting various criminal activities and that the vehicle is being used by the police for further investigations.

5. The respondents further contend that the petitioner has failed to disclose the fact that he is charged at the Chief Magistrate's Court in Nairobi, in **Criminal case No. 1349 of 2017** and that the said motor vehicle was used in the commission of criminal activities hence it should not be released. The respondents aver that the petition lacks merit and is an abuse of the due process of the court.

Petitioner's submissions

6. **Mr. Munyua**, learned counsel for the petitioner, submitted highlighting their written submissions dated 24th July 2018, that the seizure and detention of the petitioner's motor vehicle is illegal, irregular and unlawful following his arrest on 20th July, 2017. According to learned counsel, the respondents failed to provide any valid reasons for the seizure and detention. In a bid to buttress this submission, counsel relied on the case of **Jacinta Wanjiru Kamau v District Criminal Investigation Officer, Kisii County & another** [2013] eKLR where the court held that at the time of the seizure of the petitioners' vehicle the 1st respondent failed to give reasons for detention of the subject motor vehicle.

7. According to counsel, there was no merit in the respondent's contention that investigations were on going and did not indicate when they would come to a close; that no evidence was adduced by the respondents that complaints had been made with regard to the motor vehicle and or the motor vehicle was used in the commission of an offence to warrant its detention.

8. It is counsel's further submission that the petitioner suffered and continues to suffer damage because of the illegal detention of the motor vehicle and relies on the case of **Daneva company limited v Kenya national Highways Authority** [2014] eKLR where the court held that the plaintiff was entitled to compensation for the unlawful seizure and detention of its motor vehicle and assessed damages in the sum of KShs. 2,500,000.

9. On the allegations of material non-disclosure, learned counsel submits that the petitioner disclosed the existence of **Petition No. 402 of 2017**. However, counsel admits there is no paragraph in the present petition disclosing existence of that Petition (No. 402 of 2017). Counsel argues that the current petition raises different issues and seeks different reliefs; that the respondents are in breach of the Bill of Rights including Article 40(1) of the constitution. He urges the court to allow the amended petition.

Respondents' submissions

10. **Mr. Ogossa**, learned counsel for the respondents, opposed the petition in his oral submissions made during the hearing of the petition on 5th December 2018. Learned counsel submitted, first; that the petitioner's motor vehicle was being used for investigations in **Criminal case No 1349 of 2017** which is pending before the Chief Magistrate's court, Nairobi, in which the petitioner is charged with the offence of obtaining money by false pretences and forgery contrary to sections 393,345 and 349 of the Penal Code.

11. Learned counsel further submitted that the petitioner has not made out a case to warrant grant of the reliefs sought and relied on the case of **Republic v. Commissioner of Police and another Ex parte Michael Monari** [2012] eKLR, for the submission that all the police had to do was have suspicion which would then lead them to arrest; and **Ngunjiri v Director of Public Prosecutions & 2 others** [2012] eKLR for the submission that the petitioner should face his accusers.

12. Second, counsel contended that there was material non-disclosure on the part of the petitioner. According to Mr. Ogosso, the petitioner failed to disclose that after being charged with the criminal case, he filed **Petition No. 402 of 2017** against the Inspector General of Police, Director of Public Prosecutions and the Attorney General on 30th July 2017, three days after filing the present petition which he subsequently amended on 20th November, 2017. Counsel contended that the petitioner had through Petition No. 402 of 2017, sought reliefs in the form of a declaration that his trial in Criminal case No. 1349 of 2017 was unconstitutional; a permanent injunction barring his prosecution and compensation for violation of rights and fundamental freedoms but the petition (No 402 of 2017) was dismissed on 30th October, 2018.

13. In learned counsel's view, although aware of that petition, the petitioner's failure to disclose its existence in his amended petition was an intentional material non-disclosure which disentitled him the right to seek the court's favour.

14. Mr. Ogosso went on to submit that the complaint regarding violation of rights and fundamental freedoms guaranteed under Articles 27, 28, 40 and 47 of the constitution raised in the present petition were determined in Petition No. 402 of 2017 hence they are not available for re consideration. It is counsel's further contention that the petition does not meet the required standard to satisfy a constitutional pleading and should, therefore, be dismissed.

Determination

15. I have carefully considered the petition, the response; submissions and the authorities relied on. The issue raised in the petition is whether the petitioner's rights and fundamental freedoms have been violated.

16. The facts of this petition are not in dispute. The petitioner, the registered owner of motor vehicle registration No. KBV440H is the director of a company carrying insurance brokerage business. In November 2016, one **Peter Otieno**, instructed the petitioner to procure insurance cover for his motor vehicle Registration No. **KBP 966R** at an agreed premium of Ksh 65,000/=.

17. On 20th July 2017, Peter Otieno called the petitioner for more insurance business only for him (petitioner) to be arrested by police officers and taken to Central Police Station together with his motor vehicle. He was arrested on allegations of obtaining money by false

pretence. Although the petitioner was released on bond, the motor vehicle was detained at the police station. He filed this petition claiming that the detention of his motor vehicle was a violation of his rights including the right to property; that was malicious and that his arrest and detention for three days violated his fundamental rights. He also claimed that he has been denied the lawful use of his motor vehicle.

18. The petitioner further claimed that his arrest intimidation, vilification and personal detention, coupled with detention his personal effects in the vehicle is a violation of his dignity contrary to Article 28 of the Constitution and article 5 of the Banjul Charter, article 1 of CCPR and the right to equality and freedom from discrimination contrary to Article 27 of the Constitution and article 20 ICCPR among other international instruments.

19. The respondents have on their part denied the petitioner's contentions and argued that there were no violations; that the petition is **res judicata** in view of the decision in **Petition No 402 of 2017** and that the police have the right to hold the motor vehicle as it is an exhibit in Criminal case No 1349 of 2017 which is pending in court.

Whether petition is res judicata

20. The respondents have raised a preliminary issue of **res judicata** which I find necessary to dispose of first. They have contended that this petition is **res judicata**, based on the fact that the petitioner had filed Petition No. 402 of 2017 which has been concluded. In their view, the issues determined in that petition are the same issues raised in the present petition.

21. Under the principles of **res judicata**, the court is barred from entertaining a matter by the same parties or those acting on their behalf, over the same issue or subject matter where the issue has been conclusively determined by a court of competent jurisdiction. Section 7 of the Civil Procedure Act is clear on **res judicata** and acts as a bar to such future proceedings as a way of bringing litigation to an end. It is in that regard that the section provides that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

22. In the case of **Henderson v Henderson** [1843] 67 ER 313, the court stated with regard to the doctrine of **res judicata**;

“...where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...”

23. The point emphasized in the above decision is that parties should plead the whole of their case whenever they have the opportunity to do so rather than file cases in piece meal, thus save the court's time in dispute resolution instead of opening new litigation that could have been resolved in the previous litigation.

24. There are arguments that the doctrine of **res judicata** may not apply to constitutional petitions. (See **Wycliffe Gisebe Nyakina v AG & another** [2014] eKLR; **Okiya Omtata Okoiti & another v AG & others** [2014] eKLR and **Issack Kamau Kabira & 3 others v Commissioner of Lands & 7 others** [2014] eKLR).

25. However, as the Court of Appeal observed in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR, **res judicata** is a bar to subsequent proceedings involving same the issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. The court went on to state that;

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.” (Emphasis)

26. Flowing from the above observation, **Res judicata** is a valid defence that applies even in Constitutional petitions where there are good

reasons to do so and is raised where necessary in order to bring litigation to an end.

27. In Petition No. 402, the petitioner challenged his arrest, detention and prosecution. That arrest was on the same day as that in present petition. The reasons for the petitioner's arrest were the same reasons as in the present petition. The detention alleged in that petition was the same and the motor vehicle was detained on the same day arising from the same sequence of events. It is also important to note that in the former petition, the petitioner claimed violation of rights and fundamental freedoms just like in the present petition where he has claimed violation of fundamental rights including the right to property.

28. Applying the principle of *res judicata* to this petition, it is clear to me, that the petitioner should have included the issue of the motor vehicle in Petition 402 of 2017. This is so because the cause of action arose on the same day from the same transaction and would have, therefore, made sense to be pleaded in that petition thus saved judicial time to hear and determine all issues in one petition.

29. However, the present petition and the former were filed only days apart. Neither petition was filed after the determination of the other. Had that been the case, it would have been my considered view and holding that the present petition is *res judicata*. The two petitions having been filed almost at the same time, one could have been *sub judice* and had parties brought to the court's attention this state of affairs in good time, the two petitions could have been consolidated and heard together. The principle of *res judicata* cannot, therefore, properly apply now that the two petitions were filed at the same time as opposed to after determination of one of them.

Whether petitioner's rights were violated

30. The petitioner has contended that his constitutional rights guaranteed under Articles 27, 28, 40 and 47 of the constitution were violated due to his arrest as well as detention of his motor vehicle following his arrest on 20th July 2017. I must state from the onset that there is no novel issue to determine in so far as the petitioner's claim of violation of Articles 27 and 28 of the constitution are concerned. This is because the decision in Petition 402 of 2017 sufficiently addressed the issue of violation of the petitioner's rights and fundamental freedoms and conclusively determined them. Any other issue of a similar nature that may appear to arise for determination in this petition is, in my respectful view, moot. It is no longer novel and should not consume valuable judicial time to address.

31. Regarding the issue of violation of the right to property, the petitioner contends that his motor vehicle was detained without reasonable cause or reasons being given thus violated his right to property guaranteed by Article 40 of the Constitution. Article 40 guarantees every person's right to own property of any type and anywhere in the country.

32. If I understand the petitioner well, his contention is that detention of his motor vehicle deprived him use of the vehicle. The Constitution protects the right to property and this would extend to use of that property, for the property is meant to not only be owned but also used. The respondents have on their part contended that the petitioner's right to property was not violated; that the police were investigating a crime; that the vehicle was being used as the office and that it is an exhibit in the pending criminal case.

33. From the record, it is not denied that the petitioner is facing prosecution in the Magistrates Court and that the issue had not been determined by the time of hearing of this petition and that the vehicle, the subject of this petition, is in police custody following the petitioner's arrest and prosecution. The respondents have stated that the motor vehicle is an exhibit and at the moment, there is no evidence that the motor vehicle is not an exhibit in that criminal case.

34. If that be true that the motor vehicle is an exhibit, and there is no evidence to suggest otherwise at the moment, it is not until that criminal case is concluded that it will be clear whether or not the respondents had reasonable cause to detain the subject motor vehicle. Holding otherwise when the criminal case is live may not, in my view, be prudent in the administration of justice.

35. That being the state of affair, it my holding that is difficult for this court to determine whether or not the vehicle was lawfully detained. Once the case is determined, the trial court in that case will make any orders regarding the vehicle and if not, the petitioner would be at liberty seek redress from this court. Only then would the court be in a proper position to determine any questions of violation in detaining the vehicle and a ward appropriate damages, if necessary.

36. In the circumstances of this petition, having considered the petition, the responses, submissions and the authorities relied on; I am not persuaded on its merit. The issue of violation of the petitioner's rights were adequately addressed and determined in Petition No. 402 of 2017. On the issue of the motor vehicle, the respondents have argued that it is an exhibit in the criminal case pending before the Magistrate's court and until that case is determined, this court may not appropriately determine the rational for detaining it. For the above reasons, the amended petition is declined and dismissed. Each party do bear own costs.

Dated, Signed and Delivered at Nairobi this 28th Day of March 2019

E C MWITA

JUDGE