



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CORAM: D.S. MAJANJA J.**

**PETITION NO. 320 OF 2015**

**BETWEEN**

**FRANCIS JOHN WANYANGE.....1<sup>ST</sup> PETITIONER**

**ROBERT PAUL GACHOKA WANYANGE.....2<sup>ND</sup> PETITIONER**

**AND**

**ANTI-COUNTERFEIT AGENCY.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**THE OCS INDUSTRIAL AREA POLICE STATION.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners case set out in the petition dated 30<sup>th</sup> July 2015 is that the 1<sup>st</sup> petitioner is the registered proprietor of a Toyota Hilux registration number KBM 766B (“the vehicle”) which he used to carry on business of transporting gas cylinders. On 9<sup>th</sup> July 2015, the vehicle was impounded together with 82 assorted gas cylinders by Anti-Counterfeit Agency (“the Agency”) officers with the help of police officers. The 2<sup>nd</sup> petitioner was arrested but released on a cash bail but he was not charged with any offence. The petitioners claim that the gas cylinders have not been released causing him to suffer loss of income amounting to Kshs. 15,000/- per day. The petitioners pray for the following reliefs:

1. *A Declaration that the seizure and detention of Motor Vehicle KBM 766 Toyota Hilux is in derogation of the Petitioners right to property.*
2. *A Declaration that the seizure of the subject Motor Vehicle along with 82 assorted full Gas Cylinders is a blatant violation of the Petitioner’s right to property, administrative action, the right to due process and protection of the Law.*
3. *A Declaration that the seizure of the Petitioner’s subject Motor Vehicle and 82 full Gas Cylinders is a deprivation of the Petitioner’s right to earn a living.*
4. *A Declaration that the continued demand that the 2<sup>nd</sup> Petitioner report to the Police is a deprivation of his liberty.*
5. *An Order that the Respondent do compensate the Petitioner for the violation of their rights.*
6. *An order that the Respondents do make good to the Petitioners not less than Kshs. 15,000 per day from 9<sup>th</sup> July till the date of final release of the Motor Vehicle being special loss occasioned by the illegal detention thereof.*
7. *An Order that the Petitioner’s Motor Vehicle KBM 766 Toyota Hilux be released to the Petitioner’s forthwith and unconditionally.*

8. An order that the Petitioners 82 assorted full Gas Cylinders be released to the Petitioner.

9. An order directed at the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents prohibiting them from further requiring the 2<sup>nd</sup> Petitioner to report to the Police or otherwise to charge the 2<sup>nd</sup> petitioner in a Court of law.

10. That the Honourable Court do make such further or other orders as will restore, safeguard and protect the Petitioners rights to property, liberty, freedom and protection of the law.

11. Costs of this Petition be met by the Respondents.

2. When the petition was filed, it was accompanied by a chamber summons dated 30<sup>th</sup> July 2015 in which the petitioners sought interlocutory orders seeking release of the motor vehicle and the 82 cylinders. When the application came up for inter-parties hearing on 14<sup>th</sup> August 2015, the parties recorded a consent on the following terms;

*THAT Motor Vehicle Registration No. KBM 766B, Toyota Hilux Pick-up be and is hereby released to the registered owner on condition that he avails and surrenders the original logbook to the 1<sup>st</sup> Respondent and that he avails it to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents whenever it may be needed for purposes of evidence.*

3. The petition was supported by the deposition of Francis John Wanyage sworn on 30<sup>th</sup> July 2015 and supplementary affidavit sworn by Robert John Gachoka Wanyange sworn on 2<sup>nd</sup> March 2018. In addition to the facts set out in the petition, the petitioner set out additional facts in the supplementary affidavit. The 2<sup>nd</sup> petitioner was charged with several offences under the **Energy Act** and the **Energy (Liquid Petroleum Gas) Regulations, 2009** at the **Makadara Chief Magistrate Court Criminal Case No. 5259 of 2015** on 10<sup>th</sup> August 2015. He was acquitted on 1<sup>st</sup> September 2017.

4. After the interim orders were issued, the matter did not proceed any further until it came up for hearing following directions by the court. The court also directed that the parties file written submissions and although the respondents were duly served, they did not file any responses to the petition. Since the respondents did not file any replying affidavit in opposition to the petition and the depositions, the facts as pleaded must be taken as true and correct. The only issue then is whether the petitioner had made out a case to warrant the grant of relief.

5. At the hearing of the petition, I granted Mr Adera, counsel for the Agency, leave to address the court on legal issues despite the fact that he had not filed any documents in response to the petition. He raised several issues of law regarding the competence of the petition and also the application of the **Anti-Counterfeit Act** ("the **ACA**") and the **Energy Act**. He submitted that the petition did not plead with precision the specific provisions of the Constitution violated and how they were violated in respect of the petitioners. He pointed out that the petitioners were in violation of the **Energy (Liquified Petroleum Gas) Regulations** as they were not licenced to conduct and did not have any proprietary interest in the 82 gas cylinders, were not entitled to them and any order to release the cylinders would violate the law.

6. As regards the **ACA**, Mr Adera submitted that it was an offence to abuse the intellectual property of another person and since the cylinders belong to other companies, the petitioners were in violation of the law and the court could not order the release. He contended that the petitioners have not demonstrated that they have authority to deal with the cylinders and before they are released, the petitioners must demonstrate that they are entitled to the goods.

7. Mr Adera submitted that the petition as framed did not meet the thresh hold of a competent petition established in the case of **Anarita Karimi Njeru v Republic [1976 - 1980] 1 KLR 1262** where the court held, that a petitioner should state with reasonable degree of precision the rights which he claims to have been infringed and the manner in which they are alleged to have been infringed. I have looked at the petition and it is very clear that the petitioners seek to protect their right to property which has been taken without due process and in violation of their right to fair administrative action contrary to **Article 40(1)** and **47** of the Constitution.

8. It is not disputed that the petitioners' vehicle was impounded by the Agency and was released by consent of the parties although the logbook was not. It is also not disputed that the gas cylinders have not been released to the petitioners. Since these facts are not denied, it now falls on the respondents to justify their actions by presenting the justification for the impounding the vehicle, logbook and the gas cylinders and retaining the logbook and gas cylinders.

9. At this stage I wish to point out that after the gas cylinders were impounded by the Agency, criminal charges were brought against the 2<sup>nd</sup> petitioner by ERC for violation of provisions of the **Energy (Liquified Petroleum Gas) Regulations** including operating the business of transporting LPG without a licence, conducting the business of retail in LPG without a licence and driving a vehicle for the purpose of transporting LPG without a valid certificate. The 2<sup>nd</sup> petitioner was acquitted. As I understand, the thrust of Mr Adera's submission was that the Agency was asserting its statutory authority to seize and impound the vehicle and gas cylinders and retain them in accordance with the **ACA**.

10. The Agency is a body corporate established under **section 3(1)** of **ACA** with several functions which include combating counterfeiting, trade and other dealings in counterfeit goods in Kenya. To this end, the Agency appoints inspectors with powers under **section 23(1)** of the **ACA** to do, *inter alia*, the following;

23(a) *Enter upon any place, premises or vehicle at, on or in which goods that are reasonably suspected to being counterfeit goods are to be found, or on reasonable grounds are suspected to be manufactured, produced or made, and search such place, premises or vehicle and any person found in such place, premises or vehicle, for such goods and for any other evidence of the alleged or suspected act of dealing in counterfeit goods, and for purposes of entering, inspecting and searching such a vehicle, an inspector may stop the vehicle, wherever found, including on any public road or at any other public place;*

(b) Take the steps that may be reasonably necessary to terminate the manufacturing, production or making of counterfeit goods, or any other act of dealing in counterfeit goods being performed, at, or on in such place, premises or vehicle, and to prevent the recurrence of any such act in future: provided that those steps shall not include the destruction or alienation of the relevant goods unless authorized by an order issued by a court of competent jurisdiction;

(c) Seize and detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle;

(d).....

(e) .....

11. **Section 23** aforesaid empowers the inspector to search and seize goods suspected to be counterfeit. This power is not unlimited and is circumscribed by the requirement that the search and the subsequent seizure must be based on a reasonable belief or suspicion that the goods are counterfeit. The Agency did not file any affidavit putting forth such facts as would enable the court conclude that the search and impounding of the goods was founded on a reasonable belief. I find and hold that a reasonable belief by the Inspector is what separates an illegal action from lawful action and it is the burden of the Agency to justify its action.

12. Even if I accept that the Agency inspectors acted within the four corners of the statute in impounding the vehicle and cylinders, the law does not permit the Agency to detain the petitioners' property indefinitely. **Section 28(1)** of the **ACA** provides as follows:

*28(1) Where any goods are seized and detained under Section 23 they shall be returned less any portion thereof which has been reasonably utilized for the purpose of test analysis, to the person from whom they were seized within a period of three months after the date of seizure unless, within such period, some person is charged with an offence under this Act and it is alleged that such offence was committed in relation to or in connection with such goods. [own emphasis].*

13. Mr Adera submitted that the gas cylinders could not be released to the petitioner because the only remedy available to the petitioners was to apply to the court for determination that the goods were not counterfeit as provided by **section 25(3)** of the **ACA** which states:

*23 Any person aggrieved by a seizure of goods under Section 23 may at any time apply to a court of competent jurisdiction for a determination that the seized goods are not counterfeit goods and for an order that they be returned to him" [Emphasis mine]*

14. I disagree with that position as regards this case as the Agency has not shown or demonstrated that there was reasonable ground to believe that the impounded goods were counterfeit. It is only once the Agency has met the threshold of showing that the goods are suspected to be counterfeit that the petitioners can be called upon to prove that the goods impounded are not counterfeit. Moreover, as is clear from **section 28(1)** of the **ACA**, the statutory period for withholding the goods without charging the petitioners had long expired and there was no other reason to detain the impounded goods. I also point out that the Agency did not show or demonstrate that any other parties have complained that their intellectual property has been violated. In conclusion therefore, I find and hold that the Agency did not show any justification for impounding the vehicle and gas cylinders and holding the gas cylinders and logbook indefinitely.

15. I therefore find and hold that the 1<sup>st</sup> respondent violated the petitioners right to protection of property protected under **Article 40** by arbitrarily taking and retaining its property.

16. I now turn to the reliefs. Under **Article 22** of the Constitution this court has broad authority to frame appropriate relief after finding a violation. As the vehicle has been released, I will now order the immediate release of the logbook. As I have found no justification for withholding the 82 gas assorted gas cylinders, I direct that they be released to the petitioners. The petitioners claimed damages but before I deal with that aspect of the claim let me consider the Agency's submission on the issue of compensation.

17. Mr Adera, opposed the claim for damages on the basis that the **section 16(2)** of the **ACA** limits the circumstances under which compensation is paid by the Agency. It provides as follows:

*16(2) The Agency, inspector or person in charge of the relevant counterfeit goods depot shall be liable in respect of a claim mentioned in subsection (1) only if—*

*(a) in the seizure or removal of the alleged counterfeit goods, the inspector, or, in the detention and storage of those goods, the person so in charge, depending on the circumstances, has been grossly negligent; or*

*(b) the inspector or the person so in charge, as the case may be, in the seizure, removal, detention or storage of those goods, acted in bad faith.*

18. Assuming that the **section 16(2)** aforesaid is applicable, the Agency was clearly grossly negligent in my view. It did not demonstrate in these proceedings that its actions were justified or that there was any reasonable basis to impound the petitioners' goods. Further, the failure to release the petitioners' gas cylinders beyond the time permitted by the statute can only support this inference. Nevertheless, this petitioners case is founded on breach of fundamental rights and freedoms and the court's power to grant relief is not tied to any statutory provision.

19. The substantial claim is for damages. It is trite law that special damages must be pleaded and proved. The Court of Appeal in **Hahn v Singh [1985] KLR 716** observed that:

*[S]pecial damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable*

