



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 14 OF 2015

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 10, 19, 20, 22, 23 (1), 40 AND 47 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE RULES, 2013**

AND

IN THE MATTER OF ARTICLES 165 (1, 2, 3, 4) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE AND PROCEDURE RULES, 2006, RULES 11-24**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS AND BILLS OF RIGHTS UNDER CHAPTER 4 ARTICLE 40 (3)
OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

JOHN MESA MATIKO.....PETITIONER

VERSUS

THE AREA CHIEF, MASHANGW'A LOCATION.....1ST RESPONDENT

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

JOSEPH MOSINGO.....3RD RESPONDENT

JUDGMENT

Introduction

1. This petition arises from the alleged actions by the 1st respondent, herein, the area chief of Mashangwa Location, who on 12th March, 2015, in the company of several armed administration police officers under his command, stormed the petitioner's homestead and forcefully impounded 3 bulls (cattle) belonging to the petitioner without any reason or justification whatsoever.

2. The cattle were allegedly thereafter taken to a secret and undisclosed location and several pleas and requests by the petitioner for their release was not heeded to by the 1st Respondent thereby precipitating this petition whereupon the petitioner learnt that the cattle had been released to the 3rd respondent under unclear circumstances.

3. The petitioner now challenges the respondent's actions which he claims, amount to a violation of his fundamental rights and freedoms as guaranteed under **Article 40 (1) of the Constitution** which prohibits the state from capriciously depriving its subjects of their private property without any legal basis or justification.

Pleadings

4. Through his amended petition dated 3rd December 2015, expressed to be mounted under **Articles 10, 19, 20, 22, 23 (1), 40 and 47 of the Constitution of Kenya 2010**, the petitioner sought the following prayers:-

i. That the 1st Respondent be compelled to attend court and explain the whereabouts of the cattle currently in his custody and to confirm to the court that their safety is guaranteed until the hearing and final determination of this petition.

ii. That the honourable court be pleased to issue conservatory orders prohibiting the Respondents from parting with the possession of the 3 fully matured Bulls (cattle) belonging to the petitioners currently in their joint custody, and kept in unknown location pending the hearing and determination of this petition.

iii. The Honourable Court be pleased to issue a declaration that the impounding and/or confiscation of the petitioner's three (3) fully matured Bulls (cattle), on the 12th day of March 2015, without following the due process of law, and keeping the same at an unknown location or unlawfully handing over the same to the 3rd Respondent/ is unconstitutional and violated the petitioners right to property as provided by the Provisions of chapter 4, chapter 1, Article 40 (1 & 3) of the Constitution of Kenya, 2010.

iv. The Declaration that the state has failed to perform its mandatory duty as stipulated by the Provision of Article 21 (1) of the Constitution of Kenya 2010, and thus occasioned failure of justice and abused the very rights it is supposed to protect.

v. A Declaration that the continued holding and/or keeping private property belonging the petitioner without his consent or permission and without following the due process of law is unconstitutional and thus the same be released to the petitioner forthwith and in the event that any cattle is lost the Respondents be ordered to compensate the petitioner by paying the petitioner their assessed current market value.

vi. In the alternative, the Respondents to pay the petitioner the sum of Kshs. 185,000/=, being the value of the 3 fully matured Bulls (cattle) illegally impounded from the homestead of the petitioner as per veterinary officer's valuation report dated the 13th day of March 2015.

vii. That the court be pleased to award exemplary damages for the unconstitutional conduct of the Respondents.

viii. Any further and/or such orders that the Honourable Court may deem fit and just to

grant in the circumstances.

5. The petition was supported by the petitioner's affidavit sworn on 23rd December 2015 in which he reiterates the contents of the petition and states that the 1st respondent stormed his home on 12th March 2015 in the company of armed administration police officers and forcefully impounded his 3 bulls without any justification. He further states that the said cattle were not returned to him despite his numerous pleas only for him to realise much later after the filing of this petition that the cattle had been handed over to the custody of the 3rd respondent under unclear circumstances and on allegations that the said cattle had been stolen from the 3rd respondent. The petitioner denies having any connection or dealings with the 3rd respondent and states that the cattle in question belonged to him as his only source of livelihood. He contends that the allegation that his son one Tuesday Mesa, was suspected to have stolen cows belonging to the 3rd respondent and therefore justifying the impounding of his cattle was unknown to him and was a fabrication not backed by any evidentiary proof or legal basis because his said son has never been charged in a court of law for the alleged theft.

6. It is the petitioner's case that the respondents' actions contravene his fundamental rights enshrined under chapter 4 of the constitution. He contends that the respondents' conduct amounts to abuse of office and constitute contempt to the Rule of Law and human dignity. He states that his cattle are valued at Kshs. 185,000/= according to a veterinary officers valuation dated 13th March 2015 which he attached to his affidavit as annexure "JMM2".

7. The respondents opposed the petition through the 1st respondents' undated and unattested replying affidavit in which he states that on 9th March 2015 he received a complaint regarding the theft of 3 cattle belonging to the 3rd respondent. He further states that an undisclosed informant told him that he suspected that one Tuesday Mesa, a son to the petitioner had stolen the 3rd respondent's cows whereupon he called a baraza in which a conclusion was reached that the said Tuesday Mesa should explain the whereabouts of the lost cattle. It was upon reaching the conclusion that Tuesday Mesa was suspect that the petitioner was ordered to produce the lost cattle within 3 days. He claims that the petitioner willingly gave up his 3 cows to replace the cattle that his son had stolen and that the petitioner should not complain of his rights being violated.

8. In his supporting affidavit attached to the amended petition, the petitioner accused the 1st respondent of perjury while stating that he was never summoned to any baraza and denied that he voluntarily handed over his cattle to the 3rd respondent.

9. On 7th July 2015, the 1st respondent's said replying affidavit was expunged from the court record and the respondents granted leave to file fresh replying affidavit (s). The court record does not however show if the respondents filed any fresh replying affidavit.

10. On 7th July 2015, this court (differently constituted) granted conservatory orders barring the disposal of the 3 cattle in the 3rd Respondent's custody pending the hearing and determination of the petition.

Oral evidence

11. The petition was heard by way of oral evidence on 29th August 2016 on which date, the petitioner testified on how his cattle were forcefully impounded by the 1st respondent in the company of administration police officers. The petitioner called one witness, his neighbour one Rael Mesa Matiko, who corroborated his evidence on the manner in which his cows were forcefully carted away by the 1st respondent and armed administration police officers.

12. The case was then listed for defence hearing on 24th October 2016, by consent, on which date, the respondents and their advocate did not turn up in court thereby prompting the court, on the petitioner's request, to close the defence case after which a date was taken for mention to confirm the filing of written

submissions.

13. The parties thereafter filed their written submissions which I have considered together with the authorities cited and I have the following to say: Does the petition disclose a reasonable cause of action against the respondent?

14. Firstly, it is not in dispute that the petitioner's cattle were impounded by the 1st respondent who later on handed over the same to the 3rd respondent. The respondents did not file any replying affidavit in opposition to the petition despite having been given a chance to do so by the court on 7th July 2015 when their only replying affidavit was expunged from the court record. I note that the respondent alludes, in the written submissions, to having filed a response to the petition dated 6th August 2016. I have however gone through the court file with a fine-tooth comb and noted that no such response to the petition exists in the court file. Technically therefore, I find that the petition stands unopposed by the respondents who also failed to attend court to testify on the date slated for the defence hearing.

15. As can be seen from the respondents' written submissions, the explanation offered for the impounding of the petitioner's cattle is stated to be;

“It is our case and submission that the cattle were taken in order to replace the ones stolen by the petitioner's son. It is also our submission that a complaint was made at a baraza called in which community agreed that the petitioner's cattle were to replace the ones stolen.”

16. From the above submissions, it is abundantly clear to me that the 1st respondent admits having impounded the petitioner's cattle, which he subsequently handed over to the 3rd respondent ostensibly to replace the cattle that were allegedly stolen by the petitioner's son. What emerges from the foregoing is that the subject cattle are in the custody and/or possession of the 3rd respondent as a replacement for cattle that were allegedly stolen by the petitioner's son and this will bring me to the pertinent question of whether or not the petitioner can be held to be vicariously liable for the criminal acts if any, of his son. My finding on this issue is that it is a well hackneyed principle in law that there is no vicarious liability for criminal acts which therefore means that the petitioner cannot be held legally responsible for the theft of his son assuming that such a theft actually took place.

17. As I have already stated in this judgment, the respondents did not tender any evidence in court to counter the petitioner's claim that his cattle were unlawfully impounded. If indeed the 3rd respondent's cattle had been stolen, as alleged, it was the duty of the 1st and 2nd respondents to investigate the complaint, arrest the culprit/suspect and arraign him in a court of law to face stock theft charges. The respondents cannot be allowed to reinvent the wheel and apply kangaroo court methods in attempting to solve a stock theft case and in the process violate the law.

18. In my humble view, the actions of the respondents were unlawful and unjustified. Their actions were outlandish and are not supported by any known laws of our country. They had no justifiable reason to act in the way that they did and they have failed to make good the petitioner's claim to-date despite being aware of the provisions of the constitution that articulate the citizen's rights to own private property as enshrined in **Article 40 (3) of the constitution** and the consequences of breaches to such rights. The 3rd respondent is a direct beneficiary of the unlawful acts of the 1st respondent as he was given the unlawfully impounded cattle and he has to-date not bothered to return them to the rightful owner despite being aware of the existence of this petition. It is my finding therefore that even though the 3rd respondent did not directly participate in or have any control, mandate or authority in the forceful impounding of the petitioner's cattle, his inclusion in this case is justified in view of the fact that he is a direct beneficiary of the breaches of the constitution.

19. Articles 40 (3) of the constitution guarantees every individual the right to property and nobody is permitted to deprive another of such property arbitrarily.

20. It is the duty of the government to ensure that every citizen enjoys his rights to the fullest extent as provided for under articles 19, 20 and 21 of the constitution.

21. The respondents on the other hand acted as if the law did not exist and that they could do as they pleased. The 1st respondent forgot that he swore to protect the constitution.

22. Having found that the respondents acted with impunity and violated the constitution, the remedies available to the petitioner under **Article 23 (3) of the constitution** are;

a) “A declaration of rights

b) An injunction

c) A conservatory order.

d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the bill of rights and is not justified under article 24.

e) An order for compensation.

f) An order of judicial review..”

23. In the instant petition, the petitioner sought for a conservatory order, declarations, an order for compensation and exemplary damages. Conservatory orders were issued on 7th July 2015 directing that the subject cattle be preserved and not disposed off by the 1st and 3rd respondent pending the final determination of the petition. I will therefore proceed to deal with the rest of the prayers.

24. Having found that the respondents’ actions were unlawful and unjustified, it logically follows that the petitioner is entitled to the orders that he seeks against the respondents. I therefore grant prayers (iii), (iv) and (v) of the petition.

25. In the event that the respondents are unable to forthwith release the cattle to the petitioner, they will be liable to pay the petitioner the total sum of Kshs. 185,000/= being the assessed value of the 3 bulls according to the valuation report of P.N. Nyamwega dated 13th March 2015.

26. Further in the event that the respondents are only able to release some of the cattle to the petitioner, the missing cattle will be valued on the basis of the same report by Dr. P. N. Nyamweya and the amount thereof paid to the petitioner.

27. On damages, the petitioner submitted that he was entitled to both general and exemplary damages. It is however noteworthy that the petitioner prayed for only exemplary damages in his amended petition. Consequently, this court will only address itself to the prayer for exemplary damages. In the case of **Rookes vs Banard (1964) AC 1129**, it was stated:

“Exemplary damages are awardable, inter alia, where it was shown that there has been oppressive conduct by the government servants which includes oppressive, arbitrary or unconstitutional action by government servants.”

28. The instant petition fits in the description of an instance where there is high handedness and oppression by government servants against citizens whom they swore to protect. This court notes that the respondents have continued to sit pretty and have not bothered to make good the petitioner’s claim by returning to him his cattle that were unlawfully confiscated from his home way back in March 2015, almost 2 years ago. The petitioner stated that the impounded cattle were his main source of livelihood and therefore it goes without saying that he has been deprived of his sole source of livelihood for all this while. The petitioner prayed for an award of Kshs. 300,000/= for exemplary damages. The respondent did

not submit on the issue of exemplary damages. In the circumstances and taking into account the long period that the petitioner has been deprived of his cattle, I find that the award of Kshs. 150,000/= exemplary damages will suffice.

29. In sum I make the following orders against the respondents jointly and severally;

1. The petitioner is allowed in terms of prayers iii, iv and (v).

2. In the event that the respondents are unable to comply with prayer (v) above, they will be liable to pay to the petitioner the sum of Kshs. 185,000/= being the value of the 3 bulls (see paragraph 25 and 26 of this judgment).

3. Exemplary damages in the sum of Kshs. 150,000/= is allowed and awarded as against the 1st and 2nd respondents.

4. The petitioner shall have the costs of this petition.

Dated, signed and delivered in open court this 27th day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

Mr. Omwoto for the Petitioner

N/A the Respondents

Omwoyo: court clerk