



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 144 OF 2016

**In the matter of article 22, 23, 40 of the constitution of the Republic of Kenya,
2010 and supervisory jurisdiction and protection of Fundamental
Rights and Freedoms of the Individual (High Court Practice
and Procedure) Rules 2006**

and

**In the matter of alleged contravention of Fundamental Rights and Freedoms under
Articles 10, 40 and 47 of the constitution of Kenya regarding protection of the
Right to Property relating to motor vehicle KCF 960 Y**

and

**In the matter of article 243, 244 and 245 of the constitution
of Kenya in respect to the National Police Service of Kenya**

and

**In the matter of abuse of legal power by the National Police Service of Kenya
in the capricious manner in which they detained motor vehicle KCF 960 Y**

BETWEEN

Isaboke David.....Petitioner

versus

The Inspector General of Police.....1st Respondent

Mwananchi Credit Limited.....2nd Respondent

Hon. Attorney General.....3rd Respondent

JUDGEMENT

The Petitioners case

The petitioner avers he is the registered proprietor of motor vehicle KCF 960 Y (hereinafter referred to as the vehicle), having procured it through the second Respondent and that on 17th March 2016, the first Respondents flying squad officers illegally detained the vehicle and that the second respondent undertook in writing to release the vehicle upon clearance of cheque number 000003 being the final settlement of the purchase price but the same day the second Respondent in breach of the said undertaking released the vehicle to the first Respondent.

The petitioner further avers that the said officers revealed that they were not undertaking any criminal investigations but were merely keeping it in safe custody for the second Respondent and that despite demand through the petitioners advocates, the officers failed or refused to release it. The petitioner avers that the action complained of is malicious, arbitrary and an infringement of the petitioners property rights, hence the reliefs sought in the petition.

Second Respondents Response

The second Respondent in an affidavit sworn by a one Dennis Mwangeka Mombo filed on 19th April 2016 avers *inter alia* that sometimes on 19th December 2015 a one Simon Kiriiri trading as Ten Fold Motors Ltd approached the second Respondent, a non-deposit taking microfinance company whose transactions and services include cheque discounting, asset financing and advancement of loans at interest rates and upon agreed terms subject to the law of contract advanced to the said person a loan of Ksh. 512, 294/- for purposes of clearing a motor vehicle at the port of Mombasa, at agreed compounded interest rate of 10% translating to Ksh. 563,524/= payable in one instalment on or before the 19th January 2016. In support thereof he annexed copies of documents (DM2) relating to the said vehicle given to him by the borrower and stated that it was its practice to effect payment in the importers name to clear the vehicle at the port of entry and payments made are converted into a loan repayable as per the loan agreement and also a chattels transfer instrument is executed, hence the borrower did execute a binding loan agreement, chattels mortgage and that the second Respondent has a lien over the said vehicle.

He avers that problems began after the borrower defaulted in repaying the said loan and that it was not until march 2016 when the said borrower asked the second Respondent to release the vehicle since he was arranging to repay the loan and that the petitioner would deliver to him a cheque for Ksh. 250,000/= referred to in the petition and would directly transfer to his bank Ksh. 725, 049/= and asked for the written assurance referred to in the petition and that he declined to release the vehicle for lack of evidence that the cash had been transferred to his account. He later learned that the vehicle was registered in the petitioners name and sensing fraud, he placed it under police custody and that he had no agreement with the petitioner. He annexed documents in support of his averments.

Third Respondents Response

The Hon. Attorney General did not file a Response to the petition. Miss Mwangi, counsel for the AG informed the court that the third Respondent did not wish to file a response.

Petitioners Advocates submissions

Counsel for the petitioner submitted *inter alia* that the petitioner was by virtue of section 8 of the Traffic Act^[1] the lawful owner of the vehicle, that the receipts and agreements exhibited by the second Respondent had inconsistencies in the dates, that the petitioners right to property and fair administrative

action was infringed and urged the court to find for the petitioner as prayed. On damages for loss of user, counsel suggested Ksh. 378,000/= arrived at the rate of Ksh. 1,500/= for 252 days.

Second Respondents submissions

Counsel submitted that the petition is misconceived, that it is a civil dispute in that it is a commercial dispute, hence has no constitutional issues and that it would be great injustice if the vehicle is released without the loan being paid.

Whether this petition raises constitutional issues

It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.^[2] This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. In *John Harun Mwau vs Peter Gastrol & 3 Others*^[3] the court made the following observation:-

"Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it.....It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all."

In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the case in light of the provisions of the Constitution.

When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful...the question is whether the argument forces us to consider constitutional rights or values.^[4]

The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*^[5] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*^[6] notes that:-

"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction." ^[7]

Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. ^[8] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organise an analysis of the nature of constitutional matters arising from the cases before the Court.

Inspired by *John Locke*,^[9] the fundamental constitutional principle is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorized by law. In

my view, the evidence adduced by both parties clearly reveal a civil dispute, arising from the existence of a contractual transaction, or whether or not such a contract existed, and if so, who were the parties, the obligations and rights of the parties if any, hence, the case before me does not raise constitutional questions at all.

Whether the petitioner has proved his case.

The petitioner at paragraph C 6 of the petition avers that:-

"The second Respondent made an undertaking to release the said motor vehicle KCF 960 Y to the petitioner herein on 17th Day of March 2016 upon clearance of the cheque numbered 000003 and dated 14th March 2016 issued by Ten Fold Limited as final settlement of the sale of motor vehicle registration KCF 960 Y"

Curiously, this is the same cheque referred to by the second Respondent in his affidavit a copy of which is marked DM6. This striking coincidence has not been explained by the petitioner. It is not explained why and how the said cheque was paid evidently on his behalf to secure the release of the vehicle. The involvement of the interested party and the fact that he issued the cheque in question to secure the release of the vehicle to the petitioner rendered credence to the second Respondent's evidence. The written undertaking relied upon by the petitioner also confirms that the vehicle was to be released upon clearance of the said cheque otherwise no explanation has been offered as to why it was necessary to execute the said undertaking and why the petitioner accepted it.

In my view the petitioner has failed to discharge the burden of proof to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[\[10\]](#) remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britstone Pte Ltd vs Smith & Associates Far East Ltd*[\[11\]](#) :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side*. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[\[12\]](#) **Lord Denning** said the following about the standard of proof in civil cases:-

'The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

Determination

In my view, after carefully analyzing this case and the evidence tendered by the parties and the relevant law, I find that this petition does not raise constitutional issues at all, it is a civil dispute, emanating from a contractual transaction and even then, the evidence before me does not on a balance of probabilities establish the petitioners case to the required standard. Section 8 of the Traffic Act^[13] cited by the petitioner only creates a rebuttable presumption and cannot in any manner be invoked to resolve this dispute raised in this case.

To my understanding a logbook or certificate of search is not conclusive proof of ownership though such document may purport to show the registered owner but may not be conclusive proof of actual ownership of a motor vehicle as the above section clearly points out or provides that the contrary can be proved. This is a clear recognition of a fact that often times, vehicles change hands but records are not adjusted to reflect the actual position. This position was appreciated by Hon. H. M. Okwengu, J (as she then was) when stated:-^[14]

“It is true that a certificate of search from the Registrar of motor-vehicles would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicles. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time’s vehicles change hands but the records are not amended.”

In any event, the dispute before me is not who was the registered owner of the vehicle but alleged breach of contractual obligations arising from transactions between the parties which as I have held above, raise no constitutional issues.

In conclusion, in view of my analysis of the facts of this case and the law and authorities as stated above, I find that the petitioner has failed to prove his case against the second Respondent or any of the Respondents and the interested party to the required standard. The up short is that this petition fails. Accordingly, I dismiss this petition with costs to the second Respondent.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 19th day of May 2017

John M. Mativo

Judge

^[1] Cap 403, Laws of Kenya

^[2]<http://www.yourdictionary.com/constitutional-question>

^[3]{2014}eKLR

^[4]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

^[5] {2002} 23 ILJ 81 (CC)

^[6] {2001} (1) SA 912 (CC)

^[7] 2001 (1) SA 912 (CC)

^[8] Supra note 5 at paragraph 23

^[9] Chapter 9, Line 124, John Locke, *Second Treatise on Government* (1690)

[\[10\]](#){1955} 1 WLR 948 at 955

[\[11\]](#){2007} 4 SLR (R) 855 at 59

[\[12\]](#) {1947} 2ALL ER 372

[\[13\]](#) Supra

[\[14\]](#)In the case of Samwel Mukunya Kamunge vs John Mwangi Kamuru, Civil Application No.34 of 2002