



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
PETITION CASE NO. 60 OF 2014

IN THE MATTER OF: ARTICLE 22 & 23 OF THE CONSTITUTION OF KENYA AND SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL, (HIGH COURT PRACTISE AND PROCEDURE RULES 2013)

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL, RIGHTS AND FREEDOMS UNDER ARTICLE 10, 27, 28, 40, 46 & 47 OF THE CONSTITUTION REGARDING UPHOLDING OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION, RIGHT TO PROTECTION OF HUMAN DIGNITY, PROTECTION OF RIGHT TO PROPERTY, PROTECTION OF ECONOMIC INTEREST AND RIGHT TO FAIR ADMINISTRATIVE ACTION

IN THE MATTER OF: THE FRAUDULENT & ARBITRARY IMPOUNDING AND DETENTION OF THE PETITIONER'S MOTOR VEHICLE REGISTRATION NUMBER KBZ 437M

BETWEEN

**CHARLES MAIMBA
KAMAU.....PETITIONER**

VERSUS

ALPHONCE ODHIAMBO OWINO.....1ST RESPONDENT
RUTH MUKUIYA IROWA.....2ND RESPONDENT
NATHAN NGETI KIOKO.....3RD RESPONDENT
CRIMINAL INVESTIGATION DEPARTMENT, THIKA.....4TH RESPONDENT
ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. Charles Maimba Kamau, the Petitioner herein, in a Petition dated 29th September, 2014 and filed on 30th September, 2014 sought the following orders –

- i. A Declaration that the impounding and continued detention of motor vehicle registration number KBZ 437M make Toyota Vitz Model DBA-having Chassis Number KSP90 20211456 and engine number IKR-0401153, white in colour is an infringement of the Petitioner's right to property by the 4th Respondent under Article 40 of the Constitution hence unconstitutional.
- ii. A Declaration upholding the Petitioner's right of ownership and entitlement to the possession of the said motor vehicle motor vehicle registration number KBZ 437M make Toyota Vitz Model DBA having Chassis Number KSP90 20211456 and engine number IKR-0401153, white in color and an order for the immediate release of the said motor vehicle to the Petitioner.
- iii. Pending the hearing and determination of this Petitioner, Conservatory Orders do issue in terms of the Notice of Motion filed herewith and upon hearing and determination of the Petition, an injunction do issue restraining the Respondents by themselves, their employees, officers, servants, agents or by any other person whomsoever acting on his behalf from removing, transferring, re-locating, alienating, disposing nor in any other way interfering or dealing with the said motor vehicle motor vehicle registration number KBZ 437M make Toyota Vitz model DBA having Chassis Number KSP90 20211456 and engine number IKR-0401153, white in colour.

2. The Petition was supported by the grounds on the face thereof, and the Affidavit of the said Charles Maimba Kamau sworn on the 29th September, 2014.

3. Though the Petition enjoins the First, Second and Third Respondents, the orders sought are in essence against the Fourth and Fifth Respondents. Accordingly, the Fourth and Fifth Respondents, opposed the Petition through the Replying Affidavit of Corporal Wangechi Ndungu sworn and filed on 7th July, 2015, in which the said deponent denied all the claims in the Petition by the Petitioner, and avers in paragraph 6 thereof that the motor vehicle KBZ 437M, the subject of the Petition, according to the records held by the Registrar of Motor Vehicles, belongs to one, Alphonse Odhiambo Owino, the First Respondent, who had originally sold it to Ruth Mukuiya Irowa, the Second Respondent, who had issued him with a purported Bankers Cheque for Ksh650,000/= drawn on N.I.C Bank, but which cheque had turned out to be fake upon presentation for payment. The First Respondent had therefore reported the matter to the Fourth Respondent, Criminal Investigation Department Thika, who then carried out investigations, and traced the motor vehicle to Mombasa, and then driven by the Petitioner, to Thika Criminal Investigation Department, where at the time of hearing of the Petition it is still parked.

4. The deponent therefore concluded that the Petition is not only frivolous, vexatious, but is also an abuse of the court process as the Petitioner has not shown any breach or aggravation of his Constitutional rights by any of the Respondents.

5. Despite the detailed narration of the web of deceit and fraud (issuing a bouncing cheque) and false Identity cards of the persons who allegedly witnessed the sale of the motor vehicle to him, the Petitioner has not had the temerity to respond to the averments, in the said Replying Affidavit (of Corporal Wangechi Ndungu). Despite apparent service, the other Respondents took no part in the Petition.

ANALYSIS

6. The Petition herein is premised under the provisions of Articles 20(the Application of the Bill of Rights), 40 (the right to property), and 47, (the right to fair administrative action), and Article 46 (the protection of consumer rights). I will, for the purpose of this judgment only consider, articles 40, and 47 as I think the other articles cited in support of the Petition are totally irrelevant.

7. In my opinion, a person invoking in aid the provision of Article 40 of the Constitution, (the right to protection to property) must show – by credible evidence (oral, or by affidavit) the right to or the

beneficial interest to the Property.

8. The Petitioner alleged that he bought the motor vehicle from the Second Respondent who had used an ID Number which belonged to another person, and which person could not be traced by officers of the Second Respondent. This strengthens the case that the Petitioner was part of a web of persons who wanted to, and had succeeded in conning the First Respondent of his motor vehicle. The Petitioner had no property in the motor vehicle, and no right of his to the property (the motor vehicle) had been infringed by the Fourth and Fifth Respondents, or indeed the First, Second and Third Respondents.

9. Lastly, it is the function of the Kenya Police Service or its officers, upon receipt of any complaints relating to commission of crime to carry out investigations and for the purpose, may take and detain any item, including a motor vehicle, the subject of investigation. Such actions cannot be regarded as confiscation of property or contravention of Article 40 of the Constitution of Kenya 2010. That leg of the Petitioner therefore fails.

10. Regarding the right to fair administrative action under Article 47 of the Constitution, the actions of the Fourth Respondent must be commended as they were in accord with provisions of the Kenya Police Service Act 2011.

11. The Third Respondent carried out painstaking investigations in tracing the Petitioner, the Petitioner's accomplices, and eventually to the Petitioner who voluntarily drove the motor vehicle to Thika Police Station yard where it was detained as of the time the Replying Affidavit was sworn. It does not lie, and it is foul in the mouth for the Petitioner, to charge the Fourth and Fifth Respondents with contravening either his right to property or to fair administrative.

12. If the Petitioner has any claim at all, it is against the person or persons who "sold" the motor vehicle to him. That would make his claim a peculiarly civil action not a Constitutional action.

13. In the circumstances, I find and hold that the Petition herein is not merely frivolous, vexatious, but it is also entirely misconceived and a pure abuse of the Constitutional Petition process.

14. In the circumstances it is dismissed with costs assessed at shs.100,000/= to be paid by the Petitioner to the Fourth and Fifth Respondents in equal amount within thirty (30) days of the date of this judgment, and in default enforcement process to issue.

15. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 29th day of February, 2016.

M. J. ANYARA EMUKULE (MBS)

JUDGE

In the presence of:

No Appearance for Petitioner

Miss Lutta for Respondent

Mr. Kaunda Court Assistant