



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 43 OF 2014

JACINTA WANJIRU KAMAUPETITIONER

VERSUS

THE DISTRICT CRIMINAL INVESTIGATION OFFICER, BOMET.....1STRESPONDENT

THE COMMISSIONER OF CUSTOMS & EXCISE.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The issues for determination in this petition are:

1. **whether the 1st Respondent's action of posting notice on the Petitioner's Motor vehicle Registration Number KBF 75R, Mitsubishi Canter (hereinafter in this judgment referred to as "the suit motor vehicle") and subsequent impounding and detention of the suit motor vehicle at Bomet Police station is illegal and unconstitutional and an infringement of the petitioners right to property as envisaged by Article 40 of the constitution.**
2. **Whether an order of prohibition should be issued against the respondents to stop them from levying and/or demanding any other payment of duty in respect to the suit motor vehicle and from impounding or detaining the same on account of non-payment of duties.**

2. The Petitioner is a female adult of sound mind residing in Kisii Town and had imported the suit motor vehicle into the county.

3. The 1st, 2nd and 3rd respondents are state officers in the employment of the Kenyan government tasked with the responsibilities of investigations and prosecution of crimes, administration and collection of taxes and providing legal services and advise to the government of the Republic of Kenya respectively.

Background

4. This case arose from the events of 10th October, 2014 when officers from the offices of the 1st and 2nd respondents carried out an inspection of the suit motor vehicle and established that it had a **Chassis number FE638E-522950** and engine number **E818644D35** which was different from the records kept by the 2nd Respondent which indicated that the chassis number was **FE 658E-522950**

and engine number **4D34-D33739**.

5. The said inspection revealed that there was a marked difference between the declaration made at the time of the importation of the Motor Vehicle and the physical chassis and engine number of the suit motor vehicle thereby creating the suspicion that the same had been tampered with.
6. The difference in the declared chassis and engine number of the suit motor vehicle as at the time of importation and at the registration point was construed by the respondents to mean that the same had been tampered with and/or that there was false declaration at the time of entry and registration of the suit motor vehicle thereby leading the respondents to conclude that the suit motor vehicle was an uncustomed good within the meaning of “uncustomed goods” under the **East African Community Customs Management Act 2011, (EACCMA)** which Act the 2nd respondent was mandated to enforce.
7. According to the Provisions of EACCMA uncustomed goods are liable for forfeiture and in this regard a F89 form was on 10th November, 2014 issued (being a notice of goods Deposit in Customs Warehouse) indicating that the suit motor vehicle was a suspected uncustomed good, that was therefore under investigations.
8. The Petitioner, on her part states that she had paid all the assessed duties into the 2nd respondents bank account and the mere fact that there was a difference between the suit motor vehicles chassis and engine numbers declared at the registration point and the actual numbers noted on the vehicle during the inspection did not warrant the action taken by the respondents to seize and detain her said motor vehicle because no member of the public or entity had complained that the subject suit motor vehicle was either a proceed of a crime or had been used in execution or furtherance of a crime.

Petitioner’s case

9. The Petitioner seeks the following reliefs in the petition:
 - a. **A declaration do and is hereby issued that the issuance of the Notice dated 10th October, 2014 and the subsequent detention of motor vehicle registration no. KBF758R at Bomet Police Station is illegal and unconstitutional and an order be and is hereby issued that motor vehicle registration no. KBF758R be forthwith released to the petitioner.**
 - b. **An order of prohibition do issue prohibiting the respondents or any other person (s) acting under their direction and/or authority from levying, further levying, and/or demanding any other duties with respect to motor vehicle KBF758R and/or from impounding, retaining the said motor vehicle on account of unpaid duties in light of duties in the sum of Kshs. 223,441/= paid into the 2nd respondent’s bank account no. on 11th December, 2014.**
 - c. **The respondents be condemned to pay damages as may be assessed by this honorable court for trespass upon private property, that is, motor vehicle registration no. KBF758R.**
 - d. **Costs of and incidental to this petition be borne by the respondents, jointly and severally, in any event.**
 - e. **The Honorable court be pleased to issue such further orders as may be deemed expedient.**
10. The petitioner’s case is presented through the petition dated 5th December, 2014 and the petitioner’s supporting affidavit and supplementary affidavit sworn on 5th December, 2014 and 6th June, 2015 respectively. The petitioner also filed written submissions on 1st December, 2015. The petitioner contends that she was the importer of the suit motor vehicle and that the action by the officials of the 1st and 2nd respondents to post a notice dated 10th November, 2014 on the said vehicle on suspicion that the said vehicle was an “uncustomed good” was unprocedural and premature since she had already paid all the assessed taxes as shown in her annexure marked “JWK03”.

11. The petitioner attributed the variance between the declared and actual physical chassis and engine number of the suit motor vehicle to an error on the part of the shipping agent M/s Trans Effective Co. Ltd who made erroneous entries in the Port Release order (annexture “JWK 11”) that showed the chassis number as FE-658-522950 instead of FE-638-522950.
12. The petitioner states that the suit motor vehicle was, vide a sale agreement dated 13th October, 2008 sold to one Samson Kiprono Chamtany for Kshs. 1,650,000/= as shown in her annexture “JWK04” to her affidavit.
13. The Petitioner’s case is that on 10th November, 2014, the police officers from the 1st respondent’s office impounded the said vehicle and posted a notice on it to the effect that it was a suspected uncustomed good liable to be disposed of within two months as the commissioner of customs and excise may direct.
14. The petitioner contends that she had paid all the assessed tax as shown in her annexture “JWK3” and that the issue of the variance in the declared engine and chassis number with the actual numbers was an error committed by her shipping agents for which she had sought an amendment through a letter to the 2nd respondent dated 18th November, 2014, as shown in annexture “JWK-08”.
15. The petitioner therefore argues that having paid the assessed taxes and having sought an amendment of the engine and chassis numbers from the 2nd respondents, the respondents had no reason to seize or continue holding the suit motor vehicle vide an unlawful notice issued on 10th November 2014.
16. The petitioner further contends that she was denied her right to fair administrative action under Article 47 of the constitution as the 1st and 2nd respondents did not afford her an opportunity to explain the discrepancies appearing on the chassis and engine numbers of the suit motor vehicle. The petitioner also maintained that the provisions of EACCMA were not applicable to this case as the suit motor vehicle was imported in 2007 before the act came into force in 2011 and as such, Section 201 and 203 of the said Act could not be applied to this case retrospectively.
17. The petitioner concluded her case by abandoning her prayer in the petition for general damages but maintained that she was entitled to the other orders sought in the petition being prayers for costs prohibitory declaratory orders.
18. The petitioner relied on the case of **Salim & Another vs Kikara [1989] KLR 534**.

Respondents’ case

19. The respondents opposed the petition while relying on the 2 affidavits of Julius Ephraim Irungu Njeri and Peter Muchina sworn on 11th February, 2015 and 19th January 2015 respectively.
20. The 1st and 3rd respondents case is that the suit motor vehicle was impounded by the police when it was found parked on the road side at Mogosiek Trading Centre in Bomet County and the police detected it to be suspect. The respondents contend that on conducting investigations and inspection of the said motor vehicle, they noted that the chassis and engine numbers actually on it did not match the numbers on the copy of records issued by the motor vehicles registrar thereby leading them to conclude that the chassis and engine numbers had been tampered with, with a view to evading the payment of taxes.
21. It was upon noting the discrepancies on the engine number, chassis number and the motor vehicle body type that the 2nd respondent then mounted/posted a notice on the said vehicle to the effect that it was a suspected uncustomed good.

22. The respondents' case is that they acted lawfully within their mandate and did not contravene the petitioner's rights as alleged.
23. The respondents' contend that they acted in good faith and did not infringe on the petitioners rights under articles 27, 40, 47 and 50 of the constitution. They therefore sought the dismissal of the petition.
24. The respondents' case was presented through the affidavit of Peter Muchina, a supervisor working with the 2nd respondent at their Kisumu office. He depones that upon verifying the engine and chassis numbers of the suit motor vehicle, he noted that the chassis number was EE38B-022950 and engine number was E818644D35 and this differed from the 2nd respondent's records contained in import documentation declarations indicated that the chassis number was FE638E-522950 and the engine number as 4D34-D33739.
25. It was the 2nd respondent's case at section 203 of the East African Community Customs Management Act (EACCMA) makes it an offence for anyone to make or cause to be made any declaration, certificate, application or other document which is false or incorrect.
26. According to the 2nd Respondent, this was a clear case of misdeclaration or false declaration intended to evade the payment of duty at the correct rate.
27. The 2nd respondent contended that it had a statutory mandate to intervene and seize goods believed to be uncustomed and seize motor vehicles conveying such goods and that upon such a seizure, the onus is on the owner of the said goods to prove that the same is not uncustomed under section 215 of EACCMA.
28. The 2nd respondent relied on the case of *Crywan Enterprises Ltd Vs Kenya Revenue Authority NRB HC. Pet. No. 322 of 2011.*
29. The 2nd respondent contended that it cannot be faulted for carrying out its statutory mandate in seizing and detaining the suit motor vehicle.
30. The 2nd respondent further states that it is justified under section 214 5 to continue detaining the suit motor vehicle until the claimant expunges the onus of proof placed upon her to explain the discrepancies or until the matter is dealt with in accordance with Section 219 of EACCMA.
31. The 2nd respondent added that none of the petitioner's rights had been infringed as alleged and therefore the petition ought to be dismissed with costs.

Determination

32. After perusing the pleadings, the parties respective submissions and the authorities cited, I note that the issues that requiring my determination are as follows:
- a. **Whether the respondents were justified to seize and post a notice on the suit motor vehicle.**
 - b. **Whether the petitioner is entitled to the prayers sought in the petition.**
 - c. **Whether the East African Community Customs Management Act is applicable in this case.**
 - d. **Whether the Petitioner has the locus standi to file this petition.**

Seizure of the suit motor vehicle

33. The Petitioner has claimed that her right to fair administrative action under article 47 of the constitution had been infringed upon by the respondents who allegedly seized and posted a notice of "uncustomed goods" on the suit motor vehicle without affording her an opportunity to explain the anomaly that existed in the engine and chassis numbers.

34.The respondents on the other hand explained in the replying affidavit of one Julius Ephraim Irungu Njeri at paragraph 6 as follows:

“That I know of personal knowledge that the owner of the motor vehicle was searched and when finally traced, I asked the owner one Samson Kiprono Chamtany to drive the said vehicle to Bomet Police Station for further investigation and interrogation, the same was booked vide OB 6/21/9/2014 (Annexed hereto and marked JEIN-1 is the OB extract).”

35.The petitioner, on her part, also conceded in her affidavit in support of the petition that she and/or her husband had on 13th October, 2008 sold the suit motor vehicle to one Samson Kiprono Chamtany in which case, she has attached a copy of the sale agreement as annexure JWK4 to the affidavit. Clearly therefore, the petitioner cannot be seen to turn around and complain of her rights to fair administrative action or right to property under Article 40 had been infringed upon by the respondents as she no longer had any proprietary rights over the suit motor vehicle which now belonged to a third party.

36.In any event, the seizure of the motor vehicle was for the purposes of verifying the authenticity of its registration which, I hold, the 1st and 2nd respondent, have a mandate to do if they have reason to suspect that there is reasonable suspicion that the same is not valid/authentic as was the position in the instant case.

37.I find that, having relinquished her ownership rights to the vehicle to a third party through the sale, the petitioner has no basis to complain that her ownership rights have been violated and in any case, even if she still owned the suit vehicle, the police and the customs officials would still be entitled to seize it on reasonable suspicion and for investigations purposes.

Indeed **Section 153 of EACCMA** permits the 2nd respondents to stop and search any vehicle upon reasonable grounds.

Section 213 (1) of EACCMA states:

“An officer or a police officer or an authorized public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this act or which he or she has reasonable ground to believe is liable to forfeiture has been or is about to be instituted.”

38.The suspicion that was the basis for seizing the suit motor vehicle is well explained in the said replying affidavit of **JULIUS EPHRAIM IRUNGU NJERI** and this suspicion was confirmed upon inspecting the vehicle when it was found to have chassis and engine numbers that were totally different from the numbers maintained by the registrar of motor vehicles and the records maintained by the 2nd respondent.

39.I therefore find that there was nothing untoward or unreasonable with the respondents acting on reasonable suspicion and proceeding to detain the suit motor vehicle for further investigation and inspection.

40.The 1st and 2nd respondents cannot be faulted for carrying out their statutory mandates.

I am satisfied that the respondents actions were justified, reasonable and within the confines of the law. I further find that article 47 of the constitution which provides that “every person has a right to administrative action that is expeditious efficient, lawful, reasonable and procedurally fair”, was not breached.

Whether the petitioner is entitled to the prayers sought

41. This is closely tied to the third issue of whether the petitioner has a locus standi to institute these proceedings against the respondents and therefore I will address the twin issues together.

42. On locus standi, I find that articles 22 and 258 of the constitution has provided a wide a latitude for anyone whether directly or indirectly involved in a matter to institute proceedings intended to enforce the provisions of the constitution.

The said articles provide as follows:

Article 22 –

1. **Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**
2. **In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**
 - a.
 - a. **a person acting on behalf of another person who cannot act in their own name;**
 - b. **a person acting as a member of, or in the interest of, a group or class of persons;**
 - c. **a person acting in the public interest; or**
 - d. **an association acting in the interest of one or more of its members**

Article 258-

1. **Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.**
2. **In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**
 - a. **a person acting on behalf of another person who cannot act in their own name;**
 - b. **a person acting as a member of, or in the interest of, a group or class of persons;**
 - c. **a person acting in the public interest; or**
 - d. **an association acting in the interest of one or more of its members.”**

43. In line with the above provisions and by virtue of the fact that the petitioner has indicated that she is the one who had imported the suit motor vehicle before selling it off to a third party, I find that the petitioner was clothed with the requisite locus standi to file the instant proceedings.

The applicability of EACCMA to this case

44. On the question of whether or not the East African Community Customs Management Act is applicable in this case, I find that it was a misdirection on the part of the petitioner to submit that the said Act came into force in 2011. A perusal of the said Act clearly shows that it was enacted and/or assented to on 31st December, 2004 and its commencement date noted as 1st January 2005. Clearly therefore, if the petitioner imported the suit motor vehicle in 2007, then the actions of nonpayment of taxes/duty complained about took place during the currency of the EACCMA and as such the issue of the Act being applied retrospectively does not arise. As correctly submitted by counsel for the 2nd respondent, the said Act has undergone several amendments and has been revised severally with the latest revision taking place in 2012.

Conclusion and disposition.

45. In this case, it is not disputed by the petitioner that there was a marked difference between the declared and the actual chassis and engine numbers of the suit motor vehicle, while the records maintained by the registrar of motor vehicles and as shown in the copy of records that was annexed to the respondents' replying affidavit sworn on 11th February, 2015 (see "JEIN3") shows the details defects of the suit motor vehicle as, **engine number, 4D34D33739 and chassis number FE658E-522950** and body type as Pick up, a physical inspection of the same vehicle revealed that the **engine number was E818644D35 and the chassis number as FE638E-522950**.

It is this discrepancy in the actual and declared engine and chassis numbers that led the respondents to conclude that the same had been tampered with or that there was false declaration made at the time of entry and registration of the suit motor vehicle with a view to evading the payment of the duty/taxes due.

46. Section 203 of EACCMA states as follows:

A person who, in any matter relating to the Customs—

(a) makes any entry which is false or incorrect in any particular, or

(b) makes or causes to be made any declaration, certificate, application, or other document, which is false or incorrect in any particular; or

(c) when required in accordance with this Act to answer any question put to him or her by an officer, refuses to answer such question or makes any false or incorrect statement in reply thereto; or

(d) obtains any drawback, rebate, remission, or refund, or duty which to his or her knowledge he or she is not entitled to obtain; or

(e) in any way is knowingly concerned in any fraudulent evasion of the payment of any duty; or

(f) except by authority moves, alters, or in any way interferes with any goods subject to Customs control; or

(g) brings into a Partner State, or has in his or her possession, without lawful excuse any blank or incomplete invoice, bill head, or other similar document, capable of being filled up and used as an invoice for imported goods; or

(h) counterfeits or in any way falsifies, or knowingly uses when counterfeited or in any way falsified, any documents required or issued by, or used for the purpose of, the Customs, commits an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand dollars.

47. Section 201 of EACCMA on the other hand stipulates as follows:

"Where on conviction for an offence under this Act, a person is liable to pay a fine, that person shall, unless the goods are prohibited goods or are ordered to be forfeited under this Act, pay duty on the goods in addition to the fine."

48. Section 210 states as follows:

"In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall be liable to forfeiture—

(a) any prohibited goods;

(b) any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;

(c) any uncustomed goods;

(d) any goods which are imported, exported or transferred, concealed in any manner, or packed in any package, whether with or without other goods in a manner appearing to be intended to deceive any officer;

(e) any goods which are imported, exported or transferred contained in any package of which the entry, application for shipment, or application to unload does not correspond with such goods;

(f) any goods subject to Customs control which are moved, altered, or in any way interfered with, except with the authority of any officer;

(g) any goods in respect of which, in any matter relating to the Customs, any entry, declaration, certificate, application or other document, answer, statement or representation, which is knowingly false or knowingly incorrect in any particular has been delivered, made or produced; and

(h) any goods in respect of which any drawback, rebate, remission or refund of duty has been unlawfully obtained.”

49. The respondents maintain that the suit motor vehicle is liable for forfeiture in light of the above provisions while the petitioner contends that the discrepancies were as a result of an error committed by the shipping agents Trans Effective Company Limited at the time of the declaration and registration of the suit vehicle.

50. It is noteworthy however, that the petitioner has not attached any supporting affidavit from the said shipping agents confirming that indeed there was such an error made and additionally, the petitioner has not shown that she had made any concrete efforts to correct the alleged error from the time the vehicle was imported in 2007, sold to the third party in 2008 upto the time the same was seized by the respondents in 2014.

51. It would appear that it is the action by the respondents in seizing the suit motor vehicle that jolted the petitioner to action by seeking to amend the engine and chassis number.

52. Section 211 of EACCMA given the 2nd respondent the power to impound and seize, suspected uncustomed goods and upon such seizure, the onus then falls on the owner of the goods to prove that the same are not uncustomed goods. In the instant case, I am not satisfied that the petitioner has discharged the burden placed on her as all she has done is to blame the shipping agent without any proof or supporting documents.

53. To further complicate her case, the petitioner introduced annexure “JWK11” in her further affidavit which is a Port Release Document that is completely different from the initial port release order marked “JEK07” to her affidavit in support of the petition.

54. In my humble view, the petitioner has completely failed to give a plausible explanation for the discrepancies appearing on the physical inspection of the suit vehicle’s engine and chassis numbers and the declaration documents presented to the 2nd respondent.

55. In the case of *Crywan Enterprises Ltd vs Kenya Revenue Authority (supra)* Majanja J. held that **“the ability to seize and detain goods upon reasonable grounds is one of the powers conferred on police officers, or public officials to seize goods liable for forfeiture. Without such a power, it becomes easy to evade payment of duties through smuggling. It is the power**

that falls within the scheme of the act and without this power the purposes of the Act are diminished.”

56. I note that the seizure of the suit motor vehicle was under the suspicion that it was an uncustomed good and not a stolen property as has been alluded to by the petitioner in her pleadings and submissions.

57. In view of the observations and the conclusions I have made hereinabove, the order that commends itself to me is the order to dismiss the petition dated 5th December, 2014.

58. Consequently, the interim orders of prohibition granted on 8th December, 2014 are hereby vacated.

59. Each party shall bear their own costs.

**Dated, signed and delivered in open court this 18th day of April,
2016**

HON. W.A. OKWANY

JUDGE

In the presence of:

- Sagwe for Nyamurongi for the Petitioner
- Nyangweso for Kirugi for the 2nd Respondent
- Soire for Eredi for 1st and 3rd Respondent
- Omwoyo court clerk