



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 5 OF 2014

DICKSON OSIAGO KOMBO.....PETITIONER

VERSUS

KISII COUNTY GOVERNMENT.....RESPONDENT

JUDGMENT

1. What is before me is a Notice of Motion under Order 51 of the Civil Procedure rules and Articles 19, 20, 21, 22, 23, 27(4) and 28 and 40 of the Constitution of Kenya seeking the following prayers:
 1. *That pending the hearing of this application the Honorable court be pleased to issue temporary order directing the respondent to release motor vehicle registration Number KAS 416N Nissan Sunny Saloon car to the petitioner/applicant which he uses in running his business within the Kisii County.*
 2. *That the Honourable court be pleased to declare the respondent violated the petitioner/applicant's fundamental rights by bending his motor vehicle and yet he had paid parking fees.*
 3. *That cost of this application be borne by the respondent.*
2. The above application was supported by an affidavit sworn by the applicant herein Dickson Osiago Kombo averring that he is a businessman supplying goods to his customers by use of motor vehicle registration Number KAS 416N Nissan Sunny Saloon car (hereinafter referred to as suit motor vehicle). Moreover, he contended that he normally pays for parking space within Kisii township, he has never failed to pay for the parking space whenever he is in Kisii Town and that on the 20th February, 2014, he parked the said suit motor vehicle in town and went to his shop to prepare goods which were to be supplied to his customers.
3. However, at around 11.30a.m, he went back to the parking carrying goods for supply but found that his said suit motor vehicle was not there. He then inquired from one of the respondent's officer (who was nearby) who in turn informed him that perhaps he had not paid for parking. Thereafter, the officer in charge was called and on telling him that he had paid the fee by showing him the receipt which was well displayed in the vehicle, he still refused to release the suit motor vehicle to him by demanding that he pays kshs.10,000 for towing his car.
4. Consequently, he declined to pay the said sum, as it seemed to him that it was not fair for him on the basis that his fundamental rights which are well enshrined in the constitution were being violated and one should not bind his property with no right of colour or just cause. Lastly, he contended that since the respondent impounded on the suit motor vehicle, he has lost a lot of money as business has come to a stand still since he has no vehicle to transport his goods to his

customers.

5. The above application was opposed vide a replying affidavit dated 9th May, 2014. The said affidavit was sworn by John Kangwana Onguti an employee of the respondent in his capacity as the in charge in the clamping section. He thus averred that on the material day i.e. 20th February, 2014 at around 9.30a.m. while on patrol with his officers, he came across the suit motor vehicle parked near Umoja Building along Kisii-Migori Road.
6. On inspecting the vehicle he noted that the same had no occupants, and it did not have a parking ticket displayed anywhere for the material day. He then tried to inquire from the people who were around the area on the whereabouts of the owner of the suit motor vehicle but to no avail. Moreover, he revealed that the only parking tickets that were displayed on the dash board were for the previous day and not current.
7. As a result, he asked his junior officers to clamp the said motor vehicle awaiting the owner to show up. On the same day at around 12.30p.m, he found the applicant of the suit motor vehicle who in turn displayed receipt No. 0348899 on the other part of the windscreen holding it to the wiper. Upon further inquiry, he discovered that the applicant obtained the said receipt from an attendant who had been designated another area without disclosing that his vehicle had been clamped.
8. That notwithstanding, on the same day after 5p.m. he again went to the said place where the suit motor vehicle had been parked to see if he could get the applicant. He waited until 6p.m. and on seeing no one was turning up he arranged and had the suit motor vehicle towed to the Government Yard.
9. However on reaching the government yard at around 6.30p.m., he found the applicant who claimed to be the owner of the suit motor vehicle and advised him to pay towing charges and parking fee before his vehicle could be released which he in turn promised to do. The respondent contends that to date the petitioner has not paid parking fees from 20th February, 2014, towing charges on Kshs. 10,000 and that the Government will charge storage from 20th February, 2014 to the date of payment all days inclusive.
10. Lastly, he contended that the petitioner was at liberty to take his motor vehicle any time he clears with government dues, he denied the fact that the petitioner did not find the suit motor vehicle at the parking he left it at 11.30a.m. on 20th February, 2014 and he denied the fact that the parking receipt for the day and time in issue was in the car as they could not get access to it and that the respondents are willing to release the suit motor vehicle anytime the petitioner complies.
11. In addition to this the respondents have also filed a further affidavit sworn by John Kangwana Onguti by attaching the Municipal Council of Kisii (Matatu Termini) by laws 2009.
12. When the matter came before Sitati J on 13th May, 2014 it was agreed among other directions that the above application be canvassed by way of written submissions.
13. On 9th October, 2014 a consent was recorded before Sitati, J whereby it was agreed as follows:
 1. *The petitioner herein, Dickson Osiago Kombo do deposit into court the sum of kshs. 10,000/- as security for release of his motor vehicle registration No. KAS 416N, Nissan Saloon Car by the Respondent.*
 2. *The said sum of kshs. 10,000 (Ten thousand only) shall be deposited by close of business today 9th October, 2014.*
14. When the matter came before me on 17th November, 2014 both the petitioner and respondents had filed their written submissions which I have now read and considered.
15. Before I go to the merits of the petitioner's application, the respondent has taken issue with the petitioners application in that he contends that it is fatally defective and does not meet the minimum threshold for a constitutional petition and is a mixture of civil procedure law and the constitution. To that I answer the respondent as follows: Article 22(3)(d) of the constitution of Kenya 2010 stipulates that:

“the court, while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities

Moreover, Article 159(2) (d) of the Constitution of Kenya mandates the court to administer justice without regard to procedural technicalities.

16. Furthermore, Order 51 Rule 10(2) of the Civil Procedure rules, 2010 stipulates that:

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

17. It is therefore the view of this court that in as much as the petitioner’s application leans more towards a civil suit as opposed to a constitutional issue, the technicality does not affect the substance of the application herein.

18. Secondly, I note that the petitioner’s application is pegged in Articles 19,20,21,22,23,27(4) and 28 and 40 of the constitution of Kenya 2010.

Article 22(1) of the Constitution 2010 provides;

“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, it is threatened”

19. In the **Privy Cunal case from Trinidad and Robago, Alleyne Forte V. Attorney General & Another[1997] 4LRC 338**, the question was to be struck between the interests of a car owner, and the police authorities who, in the name of the public interest had towed it away from its parking; and the judicial committee held (Lord Nicholls, at P.342):-

“A person whose car is removed may, if he wishes, challenge the law fullness of the police section in court proceedings, and recover the charge paid and obtain damages for unauthorized interference with his car. Having regard to the comparatively modest amounts involved and the foot that the payments are not fines for criminal offences, the balance which has been struck in dealing with the intractable problem of car parking in public places cannot be regarded as unfair, despite the absence of a simpler, cheaper alternative remedy where under the police must prove the lawfulness of their actions.

The principle drawn from that case is that the legal process should be marked by a fair balance between the general interest of the community and the individual and the individual”.

20. In the present case, the petitioner has contended that the respondents towed the suit motor vehicle while disregarding the fact that he had paid parking ticket for the suit motor vehicle which was hanged in suit motor vehicle’s wind screen.

21. The respondents on their part do not deny the fact that they towed the respondents motor vehicle but justify their actions by stating that:-

- a. *The parking ticket which was placed on the suit motor vehicles wind screen was the previous day’s parking ticket.*
- b. *When the petitioner realizing that his car had been damped, he produced a parking ticket which according to the respondent was paid for after they had clamped the motor vehicle.*
- c. *The respondent only towed the suit motor vehicle after 5.00p.m. upon waiting for the petitioner at the scene where it had been clamped. Furthermore upon towing the said suit motor vehicle, to the government yard, he found the petitioner in the said yard and informed him that if he wanted possession of the suit motor vehicle, he had to pay ksh. 10,000 ‘the towing charges’.*
- d. *It was the respondents evidence on affidavit that to date the petitioner had not paid the said towing charges and storage charges and after he pays the same the said suit motor vehicle will be released.*

22. This contention by the respondent in my humble view has not been controverted by the petitioner. In a further affidavit sworn by the respondents they attached a Municipal Council of Kisii (Matatu permit) by Laws 2009 whereat section 6 of the said by-laws they stipulated.

6(1) the owner of any matatu using a matatu terminus within the MUNICIPAL for the purpose of dropping or picking up a passenger shall pay the council a fee of prescribed in the second schedule to these by-laws.

2.....

3.....

4) No person shall drive a matatu into a matatu terminus for purpose of dropping or picking up passenger without displaying a valid parking permit?

23. In my humble view therefore, the fact that the petitioner's suit motor vehicle was impounded by the respondent was for a justifiable cause. I say so because from the evidence adduced vide affidavit which was never controverted by the petitioner he had parked his vehicle without paying the parking ticket for the day and tried to cover up his actions by paying for the same parking ticket hours later after the suit motor vehicle had been clamped. The petitioner clearly controverted a law which he knew existed and tried to cover up his actions.

23. For the foregoing reasons, the above application dated 28th February, 2014 cannot succeed. It is dismissed forthwith and the petitioner is condemned to pay costs to the respondents.

Dated and delivered at KISII this 27th day of February, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:

Sagwe holding brief for Okemwa for the petitioner

Ogembe (absent) for the respondent

Edwin Mongare Court Clerk.