



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 534 OF 2014

JAMLECK NJAGI LITHAA.....PETITIONER

VERSUS

NAIROBI COUNTY CRIMINAL

INVESTIGATING OFFICER.....1ST RESPONDENT

VICTORIA WANJIKU MBURU 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner is aggrieved by the preferment of charges of theft by agent in respect of motor vehicles allegedly belonging to the 2nd respondent. He has therefore filed this petition in which he alleges violation of his rights under Articles 28, 29, 40 and 47.
2. In his petition dated 31st October 2014, he seeks the following orders:
 - a. *A declaration that the respondents have violated the constitutional rights of the petitioner.*
 - b. *An order for injunction restraining the 1st respondent, from arresting the petitioner in regard to the transactions involving him and the 2nd respondent, particularly touching on motor vehicles registration number KBY 763V, KBY 544A and KBV 881 V.*
 - c. *An order for the release of motor registration number KBY 763V a Toyota Hilux sold to Paul Mulwa Langui, KBY 544A and KBY 763V to Stephen Kamau Wamaita held at Kilimani Police Station.*
 - d. *Costs of this petition.*
3. The petition is supported by an affidavit sworn by the petitioner on 31st October 2014 and a further affidavit sworn on 16th December 2014. The petitioner has also filed submissions dated 9th March 2015.

4. In his affidavit sworn on 31st October 2014, the petitioner avers that he and the 2nd respondent have had a long running business relationship for close to five years. The business entailed the purchase of motor vehicles by the 2nd respondent, who is based in the United Kingdom (UK), and shipping of the vehicles to the petitioner, who would then pay the relevant import duties and taxes, undertake their registration and sell the said motor vehicles. Upon the sale of the motor vehicle, the petitioner would recover the expenses he had incurred and a 20% commission, then give the balance to the 2nd respondent or her agents. He avers that the 2nd respondent had left him with a copy of her passport and personal identification number (PIN) certificate, and she would send signed copies of transfer forms in respect of motor vehicles by DHL. They traded in this manner, according to the petitioner, till May 2014 when the relationship went sour due to various factors, including the settlement of accounts and payments of some money to the 2nd respondent in respect of three motor vehicles namely KBY 763V, a Toyota Hilux; KBV 881 V and KBV 509 T sold to various third parties.
5. He avers that he sold the motor vehicles in terms of their arrangements, but due to disagreements on the settling of the accounts, the 2nd respondent has, allegedly in collusion with the 1st respondent, taken the illegal and unconstitutional step of impounding all the motor vehicles sold under the business arrangement between the petitioner and the 2nd respondent from their lawful buyers and threatened the petitioner with arrest. He contends that the 1st respondent has turned a normal civil matter for settlements of accounts and payment of proceeds from sale of motor vehicles into a criminal matter.
6. The petitioner avers that the respondents have, in violation of his constitutionally provided safeguards for protection of his rights, private property, fair administrative action, access to justice and fair hearing, resorted to impounding the motor vehicles in contention from the innocent third parties to whom the petitioner has sold them.
7. In his further affidavit sworn on 16th December 2014, the petitioner reiterates his contention that the 2nd respondent is using the 1st respondent as her debt collection agency, as a result of which it has abused its constitutional mandate and acted illegally, erratically and unreasonably to the detriment of his rights. The arbitrary action is demonstrated, according to the petitioner, in that even after he filed the present petition and agreed with the 1st respondent on the mode of recording his statement, the respondents have illegally and without any summons to appear before them or to appear in court charged him in Criminal Case Number 5130 of 2014 at the Kibera Law Courts, and proceeded to apply for warrants of arrest against him. He contends that the actions of the 1st and 3rd respondents show that they are not discharging their constitutional mandate but are pursuing a sinister agenda against him.
8. The petitioner denies the averments by the 2nd respondent with regard to the payment of taxes for the motor vehicles that she bought and sent to Kenya for sale. He further denies forging any documents as alleged by the 2nd respondent. He concedes that he gave some cheques to the 2nd respondent, which he avers she was not supposed to bank, but that she insisted on banking them when his accounts had no money. He also maintains that he has not refused to pay the 2nd respondent, but would do so after the accounts have been settled and funds are available.
9. The petitioner contends that he has been threatened with arrest for forgery, and is also threatened with dire consequences if he does not pay the amount due to the 2nd respondent. It is his contention further that that no document has been presented to Court to show that he has been involved in forgery; that his freedom and security were threatened by the threat to arrest him; that while the police have the right to conduct investigations, this must be done in a systematic way.
10. He alleges that he has been charged with the offence of stealing by agent contrary to section 268 as read with section 283 of the Penal Code, which offences were instituted in his absence and he was not invited to the police station. He avers that he later got to know of the charges, and applied

to have the warrant of arrest which had been issued against him lifted.

11. The petitioner avers that there is no reason advanced for the impounding of motor vehicle KBY 544A, which he sold to Paul Mulwa Langui, which is still held by the 1st respondent. He concedes, however, that the vehicle belongs to the 2nd respondent but was shipped to the petitioner as agent. He contends that the impounding of the motor vehicle threatens his security as the purchaser, Mr. Langui, is demanding from him the money he paid for it. It is his contention that the respondents are violating his right to security by holding the motor vehicle which he had sold to a third party, and he therefore prays for the grant of the orders sought in the petition.

The Response

12. The petition is opposed by the respondents. On behalf of the 1st and 3rd respondents, the Office of the Director of Public Prosecutions (DPP) filed an affidavit sworn by No. 80153 PC David Riungu on 17th November 2014. PC Riungu states that he is a police officer attached to the County Criminal Investigations Nairobi Area and was engaged in the investigation of the complaint filed by the 2nd respondent. The complaint was lodged on 29th September 2014 vide OB No. 02/29/09/14.

13. PC Riungu deposes that the 2nd respondent reported that she resides in the UK and that she had an agency relationship with the petitioner under which she required the agent to receive vehicles that she would import from the UK. The petitioner was supposed to sell the vehicles for her in exchange for a commission. While the 2nd respondent and the petitioner had a fruitful relations, she stated that she had realized on arrival from the UK that four of the cars she had imported had been transferred without her consent.

14. According to PC Riungu, the complaint stated that the arrangement between the 2nd respondent and the petitioner was that upon the sale of a motor vehicle, the proceeds would be wired to her; she would then download the transfer form, sign it and send it to the petitioner, who would then put in the purchaser's details. This, however, had not happened in the case of four motor vehicles namely KBY 763V Toyota Hilux double cabin; KBG 509T Voxwaggon Passat; KBV 881V, Nissan Navara and KBY 544A, Toyota Hilux double cabin which were imported early in 2014. The 2nd respondent later came to learn that they had been sold between March and May 2014, yet the petitioner claimed that they were still in his yard.

15. PC Riungu makes further averments with respect to the cheques drawn in favour of the 2nd respondent which were dishonoured for lack of funds; that she reported that she had visited Kenya Revenue Authority (KRA) where she learnt that the motor vehicles had been transferred to other parties despite the fact that she had not signed transfer forms; and that upon perusal of the complaint, the County Criminal Investigations office were able to deduce that the matter could be a case of forgery.

16. PC Riungu states that their investigations established reasonable grounds to impound the vehicles after examining the logbook bearing the name of the new owners of the motor vehicles as well as the shipment documents in respect of the vehicles which bore the name of the 2nd respondent. They therefore proceeded to impound the said motor vehicles. One of the motor vehicles, KBY 544A, Toyota Hilux double cabin was impounded from a Mr. Stephen Kamau Wamaitha who has since bought the motor vehicle from the 2nd respondent. PC Riungu denies that any other vehicle has been impounded as alleged by the petitioner.

17. The 1st and 3rd respondents deny that any constitutional violation has taken place, that the DPP is reviewing the evidence with a view to advising whether or not charges should be preferred against the petitioner, and the fact that a matter may be civil in nature is not a ground for prohibiting the respondents from charging the petitioner with criminal offences as provided under section 193A of the Criminal Procedure Code.

18. It is also their case that the sufficiency or otherwise of evidence is a matter for the trial court, as it goes to the merits of the decision of the DPP. In their view, the petitioner in this case seeks to have the Court embark on an examination and appraisal of the evidence, which is not the function of this Court. They rely on the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011** in this regard.
19. The DPP further observes that while the petitioner has alleged violation of his rights under Articles 29, 40, 47, 48 and 50 of the Constitution, which provide for freedom and security of the person, fair administrative action, access to justice and fair hearing, he has not, as required by the principle established in the case of **Anarita Karimi Njeru vs Republic (1976-80) KLR 154**, demonstrated how these provisions have been violated with respect to him.
20. With regard to the allegation that there has been a violation of Article 50, the DPP submits that it relates to fair hearing, and since the petitioner has only been informed of the charges that he faces and has not been brought to court, he is outside the province of Article 50. To the contention by the petitioner that the charges against him are unlawful, the DPP submits that the charges are as provided by law and are in no way illegal or unconstitutional. He asks that the petition be dismissed with costs.

Submissions by the 2nd Respondent

21. The 2nd respondent also opposes the petition and has filed an affidavit which she swore on 17th November 2014 and submissions dated 24th March 2015.
22. In her affidavit, the 2nd respondent avers that she is living and working in the UK. She states that she was introduced to the petitioner when she was looking for a car dealer to market the vehicles that she was importing from the UK and that she entered into a business arrangement with him under which would send him motor vehicles. Their arrangement, according to the 2nd respondent, was that the petitioner would, upon sale of a motor vehicle, deduct a commission of 2.5% of the total selling price, the commission payable to other car dealers locally.
23. The 2nd respondent gives further details with respect to the dealings with the petitioner, which differ materially from the contentions by the petitioner. She states that the arrangement worked well until 2014 when questions arose with respect to the sale of some of the motor vehicles. Initially, the petitioner alleged that he had not sold the said motor vehicles, but later admitted that he had. The 2nd respondent avers that she reported the matter to the police and the petitioner was summoned. It emerged that the petitioner had forged her signature, sold and transferred the said motor vehicles, and appropriated the money to his own use. The police investigated the matter and managed to trace motor vehicle registration numbers KBY 763V, KBY 544A, KBV 881V.
24. The 2nd respondent further avers that the petitioner pleaded with her to give him time to pay as he had other difficulties, including with the Kenya Revenue Authority, and when she did not consent to withdraw her complaint, he issued her with cheques totaling to Kshs7,350,000/- being the total value for the four motor vehicles. Some of the cheques that she presented to her bank were returned due to insufficiency of funds, so she did not present the others. She contends that the petitioner has misrepresented facts and is merely using the court process to hoodwink the alleged purchasers in order to avoid his obligations of giving them a clean title.
25. According to the 2nd respondent, it is not disputed that the petitioner was her agent. She made a complaint to the 1st respondent as her motor vehicles had been sold without her consent by the petitioner. It is her case that she made the complaint in good faith, on reasonable grounds and without malice. With respect to the impounding of the motor vehicles, the 2nd respondent contends that the petitioner dealt with third parties without disclosing that he was acting as an agent, and the intention behind impounding of the vehicles was to protect her interests. The 2nd respondent

asked the court to dismiss the petition with costs.

Determination

26. The petitioner's case, as is evident from the summary of pleadings and submissions set out above, is fairly straightforward. He alleges violation of his constitutional rights, citing Articles 28, 29, 40, 47, 48 and 50 of the Constitution. He alleges that the 1st and 3rd respondents have violated these rights by acting as the 2nd respondent's debt collector. It is also his argument that the respondents have abused their constitutional mandate by turning an essentially civil matter into a criminal matter. He is also aggrieved that charges were preferred against him in Kibera Criminal Case No. 5130 of 2015. He concedes that the motor vehicles in question were bought by the 2nd respondent and sent to him to sell as her agent, but argues that he sold them in accordance with their arrangement, but did not remit the funds to her as there was a dispute with regard to the accounts.
27. The petitioner's version of events is disputed by the 2nd respondent. She deposes that contrary to their arrangement, under which she would get funds for sale of motor vehicles from him before sending a signed transfer form, the petitioner sold her motor vehicles, then forged her signature on the transfer forms. It is as a result of this that she made her complaint to the police.
28. I repeat the basic requirement in constitutional petitions alleging violation of constitutional rights: the petitioner has an obligation to demonstrate the provisions of the Constitution that have been violated by the respondents, as well as the manner of violation. See the case of **Anarita Karimi Njeru vs Republic (Supra) and Trusted Society of Human Rights Alliance vs Attorney General & Others High Court Petition No. 229 of 2012**.
29. From the material before me which I have summarized above, we can dispense with the alleged violation of the petitioner's rights under Articles 40 and 50. As the petitioner is not the owner of the motor vehicles in question and was dealing with them, as he admits, simply as an agent, he cannot allege a violation of the right to property which is guaranteed under Article 40.
30. Article 50, specifically Article 50(2), deals with the rights of an accused person, and are trial related, as the Court of Appeal held in the case of **Julius Kamau Mbugua vs The Republic, Criminal Appeal No. 50 of 2008**. The petitioner has been charged, but has not yet been tried. During his trial, he will have a right to all the safeguards to which an accused person is guaranteed under Article 50(2). There is therefore no basis for alleging a violation of that particular Article.
31. The petitioner alleges that the respondents have abused their constitutional mandate by taking up what is essentially a civil matter. He has gone into some detail with regard to the dealings between him and the 2nd respondent. He invites the Court, in effect, to examine the facts of the dealings between him and the 2nd respondent, and determine whether there is sufficient evidence to charge him with a criminal offence.
32. That, I must reiterate as this Court and other Courts have done in countless decisions, is not the mandate of a Court dealing with a constitutional petition, but within the mandate of the Court seized of a criminal matter. As Warsame J stated in the case of **Michael Monari vs Republic (Supra)**:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally

whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment. ”

33. With regard to the petitioner’s contention that the matter between him and the 2nd respondent is civil in nature, section 193A of the Criminal Procedure Code dealt with that argument:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings”

34. It must be obvious by now that my view of this matter is that it has no merit. It is an attempt by the petitioner to avoid prosecution in respect of matters which the state organs constitutionally mandated to undertake investigations and prosecutions have investigated and found sufficient basis to pursue through the criminal justice process. As this Court observed in **Weldon Kechie Langat & Another vs The Director General of Police & Another High Court Petition No 482 of 2013 (Consolidated with Petition No 483 of 2013)**:

“...the fact that criminal charges are preferred against a person is not a violation of constitutional rights. The criminal justice system is underpinned by the Constitution, with safeguards placed in the Constitution and statute to ensure protection of the rights of accused persons. Further, the discretion on when and whether to bring criminal proceedings against a party is vested in the Director of Public Prosecutions, who under Article 157(10), must be independent and not subject to the direction or control of any party.”

35. This petition is hereby dismissed with costs to the respondents.

36. For the avoidance of doubt, the interim orders issued to maintain the status quo with respect to the motor vehicle(s) pending the hearing and determination of the petition are hereby discharged.

Dated, Delivered and Signed at Nairobi this 17th day of September 2015.

MUMBI NGUGI

JUDGE

Mr. Narangwi instructed by the firm of Narangwi & Associates Advocates for the petitioner.

Ms. Aduol instructed by the firm of Maina Njuguna & Co. Advocates for the 2nd respondent.

Mr. Murang’a instructed by the of State Law Office for 1st and 3rd respondent.