



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**PETITION NO. 3 OF 2012**

**MWANGI MUTAHI RUGA.....PETITIONER**

**VERSUS**

**MUNICIPAL COUNCIL OF NYERI.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein Mr. Mwangi Mutahi Ruga on 17th October 2012 filed this petition under Articles 22 and 23 of the Constitution of Kenya 2010 alleging contravention of Fundamental Rights and Freedoms under section 31(a) and (b) of the Constitution on the basis that the Respondent entered into his motor vehicle Registration No. KSP 174 took and detained it with all the items therein claiming that he owed them Ksh. 50/- of which was not demanded.
2. The Petitioner therefore prays that

***1. The court declare the act of breaking and entering into motor vehicle and confiscating and attaching his property without authority of any court of law unlawful.***

***2. Court order the council to restitute the confiscated/attached property to the rightful owner***

1. ***Order the council to compensate him for none use of his property***
- 2.

1. The petition was supported by his annexed affidavit in which he deponed that that he is the owner of motor vehicle registration No. KSP 174 which he had on 11th November 2010 at about 5.30 pm parked in Jua Kali garage for minor repairs when the same was broken into and entered and towed away by the Respondent and his personal items therein stolen.
2. That the Respondent allegedly towed away the said motor vehicle for failure to pay the parking fee. That the Respondent misused its power to breach his human rights and without taking him to court.
3. The Respondent responded to the said petition by a replying affidavit sworn by one CHARLES GICHUKI GACHANA its deputy town clerk wherein he deponed that the said motor vehicle was clamped and towed on 11th November 2010 for failure to pay the daily parking fee in breach of the (Traffic Designated parking places By-laws 2009 and that the motor vehicle was towed on 11th November 2010 to 6th December 2010 when the Petitioner was issued with an invoice totaling Ksh. 29,175 which he refused to pay.
4. That the total amount now due from the Petitioner to the Respondent is Kshs. 924,000/- and therefore the Petition is frivolous, misconceived and an abuse of the court process.
5. Directions were given that this petition be heard by way of written submissions which have now been filed.
6. **PETITIONERS SUBMISSIONS**

7. On behalf of the petitioner it was submitted that the then Local Government Act allowed the Respondent to make by-laws for particular functions under section 201 but that those by laws should not override or derogate any provision of written law and that the penalties which may be provided for is Ksh.2000/- and a daily penalty of Ksh. 20 with a cumulative total not exceeding the Ksh. 2000 and therefore this amount of Ksh. 924,000/- is in breach of the law.
8. That Article 31(a) of the Constitution protects him from his property being searched and being seized and that the said motor vehicle was under repair for which section 72D(b)(v) provides two hours grace period for minor repairs and further that the said motor vehicle was not parked at designated area as alleged by the Respondent.

9. **RESPONDENTS SUBMISSIONS**

10. The Respondent submitted that the motor vehicle was clamped at 1.49 pm for failure to pay the daily parking fee of Ksh. 50/= and later towed after 4.00 pm for failure to pay the charges which the Petitioner has not done to date.
11. It was further submitted that the impoundment of the Petitioner's motor vehicle was not a contravention of his rights and that the Petitioner failed to meet the test set out in the case of TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE vs AG & 2 OTHERS PETITION NO. 229 OF 2012 It was submitted that the Petitioner's motor vehicle was lawfully impounded and was justified by virtue of article 24 of the Constitution.
12. It was further submitted that the Petitioner's claim against the Respondent is based on the fact that his motor vehicle was impounded for failing to pay parking fee and that the Respondent confiscated his items for the said motor vehicle and thus seeks for order of restitution and compensation and that the same was not a constitutional matter and in support thereof the case of HON. UHURU MUIGAI KENYATTA V NAIROBI STAR PUBLICATION LTD petition No. 187 of 2012 registered in (2013)eKLR was used.
13. From the submissions herein the Petitioner and the Respondent I have identified two issues for determination.

1. ***Whether the Petitioners constitutional rights were violated by the Respondent.***

2.

1. ***Whether the Petitioner's case should be adjudicated by way of a constitutional petition.***

2.

1. As submitted by the Respondent the Petitioners claim is that his motor vehicle was unlawfully clamped by the Respondent and impounded and items stolen therefrom. This therefore makes this claim purely a commercial dispute which should have been filed by way of a plaint in which the Petitioner should have claimed restitution and general/special damages for loss of user in compensation.
2. I find support in the case of HON. UHURU MUIGAI KENYATTA v NAIROBI STAR PUBLICATIONS LTD where Lenaola J had this to say:
3. **"It is important to recognize that even if a case does not raise a constitutional matter the assessment of whether the case should be heard by this court rest instead on the additional requirement that access to this court must be in the interest of justice and not every matter will raise a constitutional issue worth of attention."**
- 4.
5. **Courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to an applicant under some other Legislation provisions or on some other basis, whether legal functional a court normally declines to determine whether there has been in addition a breach of the declaration of rights"** emphasis added
- 6.
7. The Petitioner herein has a valid remedy under the Civil Procedure Rules and should have therefore filed a claim against the Respondent without approaching this court through its constitutional division.
8. I am unable to see how the Respondent in exercising its statutory powers breached the rights of the Petitioner to privacy under Article 31(a) and (b) as alleged noting that the Petitioner might have a valid claim against the Respondent if it did not follow the right procedure but not for violation of his constitutional rights under Article 31 as alleged.
9. I therefore find no merit in the petition herein and therefore dismiss the same with cost to the

Respondent.  
10.Dated and delivered at Nyeri this 20th day of February 2014.

J. WAKIAGA

JUDGE

Court Judgment read in open court:

J. WAKIAGA

JUDGE

20/2/2014