



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO 535 OF 2013

UNEECO PAPER PRODUCTS LIMITED.....PETITIONER

VERSUS

RODGERS G OKUMU1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION.....3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner, which is described in the petition as a leading paper and board merchant dealing in a wide range of products with its registered office in Mombasa and having a branch office in Nairobi, has filed the present petition alleging violation of its constitutional rights by the respondents. The violations are alleged to have arisen as a result of the seizure of motor vehicle registration No KAR 518q by the 2nd and 3rd respondents.

2. The petitioner first approached the court by way of an application for conservatory orders in which it sought orders to restrain the respondents from harassing, threatening or intimidating the petitioner; to restrain them from reassigning, selling, conveying and/or transferring Motor vehicle Reg. No KAR 518Q Mitsubishi Galant which had been given as security to the petitioner by the 1st respondent for loss of monies suffered by the petitioner courtesy of the 1st respondent. Interim orders were granted restraining harassment and reassignment of the vehicle.

3. The petitioner's case is that around June 2010, while it was reconciling its books of accounts with a view of preparing its financial statements it was discovered that the 1st respondent had received from various clients and misappropriated company funds amounting to Kenya Shillings Nine Hundred and Twenty Four Thousand, eight Hundred and Forty Seven only (Kshs 9,24,847.00) which the petitioner wanted reimbursed.

4. On 17th June 2010, the 1st respondent accepted that he had received the money by virtue of being a Sale Executive and gave a personal undertaking to pay the petitioner within one week. He further surrendered motor vehicle Reg. No KAR 518Q Mitsubishi Galant as guarantee for the debt.

5. The petitioner contends that sometime in September 2013, the motor vehicle was towed away by officers of the 2nd and 3rd respondent at the instructions of the 1st respondent and is now held at Industrial Area Police Station, thus provoking the filing of this petition, in which the petitioner seeks the following orders:

- a) A declaration made by this Honourable Court that the continued harassment intimidation, threats of sanctions and/ or capricious and unwieldy demands by the respondent amounts to subjection to psychological torture contrary and in breach of the constitution.*
- b) The respondents by themselves or through their agents, servants, employees and/ or whosoever be immediately ordered to release and return to the Petitioner Motor vehicle Reg No KAR 518Q Mitsubishi Galant, given as security to the petitioner by the 1st respondent for loss of monies' suffered by the petitioner courtesy of the 1st respondent.*
- c) Costs of the petition.*
- d) Such other or further reliefs and/or directions as this court may deem just and fit to grant.**

The Petitioner's Case

6. The case for the petitioner is contained in an affidavit sworn in support of the petition by one of its directors, one of its directors, **Mr. Zeeshan Jagani**, on 11th November 2013. In the said affidavit, Mr. Jagani avers that the 1st respondent is a former employee of the petitioner who was terminated from employment after being involved in employment offences.

7. In June 2010 while the petitioner's accountants were reconciling its books of accounts with a view of preparing financial statements, it was discovered that the 1st respondent had received from various clients and misappropriated amounting to Ksh924,847.00. Following a forensic audit in which it examined delivery notes, invoices and statements of accounts from various clients, it transpired that the petitioner had lost **Ksh2,709,349** while the 1st respondent was in charge as a sales executive. The 1st respondent then accepted liability, undertook to repay and surrendered the aforesaid vehicle as security.

8. The petitioner avers further that following their audit, they made a report to the police and after the investigations were concluded, the police officers charged the 1st respondent with the offence of theft by servant contrary to section 281 of the Penal Code. The case is still pending in court. The petitioner complains that the 1st respondent thereafter instructed the police to visit their premises and demand the release of the motor vehicle without the 1st respondent fulfilling his commitment to pay the said **Ksh2,709,349** as agreed between the parties.

9. The petitioner claims that on diverse dates between September and October 2013, police officers hounded their offices with threats to arrest them unless they release the said motor vehicle; and that on 30th October 2013, Police officers drawn from the Industrial Area Police Station towed away the motor vehicle, thereby depriving the petitioner of the security it held to secure its interest. The petitioner terms the acts of the police as malicious unreasonable, rash, oppressive, irrational and arbitrary, and contends that if the orders it seeks are not granted, its rights will be violated.

10. In her submissions on behalf of the petitioner, Learned Counsel, Ms. Munyaka, asked the court to declare the actions of the respondent in impounding motor vehicle KAR 518Q illegal and unconstitutional, and to order that the vehicle be returned to the petitioner. She relied on an agreement between the petitioner and the 1st respondent dated 17th June 2010 under which the petitioner and the 1st respondent had agreed that he would surrender the vehicle as security for the payment of Ksh2,709,349 which he had embezzled from the petitioner.

11. It was her submission that the petitioner was relying on Article 27(1) and 21(1) of the Constitution

under which all persons must be treated equally before the law. She contended that by their actions, the 2nd and 3rd respondents were protecting the interests of the 1st respondent without considering the interests of the petitioner.

12. It was her submission further that the respondents had no business interfering with private contractual arrangements between the petitioner and the 1st respondent and their acts deprived the petitioner of its right in the motor vehicle.

13. She dismissed the claim by the 2nd and 3rd respondents that they were acting on a complaint by one Humphrey Okumu. It was her submission that according to documents annexed to the affidavit of **Daniel Kieny** sworn on 6th December 2013 in which a copy of the record is annexed, the said Humphreys Okumu is not the registered owner of the vehicle and so the respondents had no locus to act at his behest.

The Case for the 2nd and 3rd Respondents

14. The respondents have filed a replying affidavit sworn by PC Daniel Kieny, Force No. 85991, sworn on 6th December 2013 and submissions dated 27th February 2014. In the said affidavit, PC Kieny, who is stationed at CID Industrial Area, states that the 1st respondent Rodgers Okumu, was indeed an employee of the petitioner where he worked as a sales representative for some years; that he caused the loss of ksh924,847.00 and entered an agreement to pay, giving motor vehicle registration number KAR 518Q then in his possession as security for the debt.

15. PC Kieny states further that the petitioner filed a complaint against the 1st respondent at Industrial Area Police Station that resulted in the 1st respondent being charged with the offence of stealing by servant contrary to section 281 of the Penal Code vide Criminal Case No 2375 of 2010. He states further that upon commencement of the criminal proceedings, the agreement on which the petitioner relies as giving it the right to motor vehicle Mitsubishi Galant Reg. No KAR 518Q became null and void.

16. PC Kieny further states that pursuant to their investigations of the vehicle's records at Kenya Revenue Authority(KRA), it was established that the 1st respondent is not the registered owner of the motor vehicle, and that this further renders null and void the agreement to use the motor vehicle as a guarantee for a debt. He relies on various documents in support of his averments, including a copy of a search from motor vehicles records at KRA and a sale agreement which he avers shows the owner of the motor vehicle to be the 1st respondent's father, the said Humphreys James Okumu Barasa.

17. PC Kieny further avers that in the conduct of his trial, the 1st respondent indicated to the court that the motor vehicle KAR 518Q was his father's and that it was being unlawfully detained by an agent of the petitioner; that on 18th October 2013, the owner of the motor vehicle, one Humphreys Okumu Barasa, made a report at Industrial Area Police Station vide OB. No 15/18/19/2013; that the complaint was referred to CID Makadara who undertook investigations and discovered that the motor vehicle was being held at Kikuyu Magana area in the premises of Guaco Stationeries Limited.

18. PC Kieny depones that the motor vehicle was then recovered, though it is not clear from his affidavit whether it was towed to Industrial Area Police Station or CID Parklands. It is at any rate conceded that the vehicle was removed from the petitioner, though the allegation of threats and intimidation in the course of such removal is denied. The respondents deny that the petitioner's rights have been violated, alleging that, on the contrary, it is the petitioner which has infringed on the rights of the owner of the motor vehicle, the said Humphreys James Okumu Barasa.

19. In his submissions on behalf of the respondents, Mr. Ndege submitted that the documents annexed to the affidavit of PC Kieny showed that the legal ownership of the motor vehicle in dispute lay with one Muchogo Grace; that there is a transfer of motor vehicle form and a motor vehicle sale agreement which shows that the complainant, Humphreys Okumu Barasa bought the motor vehicle even though he had not completed changing the log book; that it was after the complaint was made by the father of the 1st

respondent regarding his motor vehicle being held by the petitioner that the 2nd and 3rd respondents commenced investigations; and it was established that the motor vehicle was held at Magana where the 1st respondent had left the vehicle.

20. Mr. Ndege submitted further that section 24 of the National Police Service Act requires the police to investigate any complaint, and that the 2nd respondent acted within the law and in exercise of its mandate. It was his further submission that there is a criminal case pending against the 1st respondent for stealing by servant contrary to section 281 of the Penal Code; that there is no case involving the motor vehicle; that the petitioner's fundamental rights are not absolute and must be balanced with those of others; and the petitioner has not demonstrated that the respondents acted unreasonably.

21. Mr. Ndege submitted further that the prayers that the petitioner is seeking are untenable as the petitioner is not the registered owner of the motor vehicle and the registered owner has the right to claim the motor vehicle; that the 1st respondent had no capacity to enter into a sale agreement in respect of a motor vehicle that was not his; and that the petitioner can institute a civil case to recover the money alleged to have been misappropriated. It was his submission that the petitioner had not demonstrated a violation of its constitutional rights, and the petition ought to be dismissed with costs.

Determination

22. The petitioner alleges violation of its rights to equal protection and benefit of the law guaranteed under Article 27 of the Constitution, which states, at sub-article (1) and (2), that:

“1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”

23. The basis of their complaint is that the 2nd and 3rd respondents have impounded a motor vehicle KAR 518Q which had been given to them as security by the 1st respondent, pursuant to an agreement dated 17th June 2010, to secure certain monies which he had misappropriated in the course of his employment with the petitioner. The petitioner alleges that the 2nd and 3rd respondents have interfered in a contract between them and the petitioner, and therefore have acted illegally.

24. The 1st respondent did not participate in the proceedings, so the court did not have the benefit of his side of the story. The 2nd and 3rd respondents make the case first, that as the petitioner complained to the police and a criminal case was brought against the 1st respondent, the agreement dated 17th June 2010 is null and void. This, in my view, is a curious argument for the 2nd and 3rd respondents to make. It is what the 1st respondent would be expected to put forward in order to, as it were, escape liability in light of the fact that he had been subjected to the criminal process. It seems strange for it to come from a police officer who appears to have been involved in the investigation of the matter. However, that is not an issue for determination by this court, and I will therefore say no more about it.

25. The respondents argue, secondly, that the petitioner is not the registered owner of the motor vehicle and therefore cannot complain that its constitutional rights have been violated. Thirdly, it is their contention that the 1st respondent, not being the registered owner of the motor vehicle, had no basis for giving it to the petitioner as security; and finally, that it is the petitioner which has violated the rights of the true owner of the motor vehicle, one Humphreys James Okumu Barasa.

26. The respondents are, in my view, correct on their second and third arguments. The petitioner is not the registered owner of motor vehicle registration number KAR 518Q Mitsubishi Galant. That being the case, it cannot complain that the 2nd and 3rd respondents have violated its right by taking the motor vehicle away from it, unless it can show that it had lawfully acquired an interest in it from the owner.

27. I note from the agreement between the petitioner and the 1st respondent that the 1st respondent surrendered the motor vehicle, which according to the agreement was his, on 17th June 2010. Almost two years later, on 15th June 2012, according to the proceedings annexed to the affidavit of Mr. Jagani as 'ZJ2', he complained to the trial court that his father's motor vehicle KAR 518Q had been taken by a Mr. Kieti, the person in charge of administration at UNEECO Paper Products Limited.

28. The documents attached to the affidavit of PC Kieny confirm that indeed the 1st respondent did not have a right to give the motor vehicle as security, and the petitioner could not therefore have acquired a lawful interest in it, even by way of security for its money, from the 1st respondent. There is therefore no basis for its claim of constitutional violation, and it cannot therefore, in my view, maintain a claim of violation of any provision of the Constitution by the respondents.

29. The respondents have alleged that it is the petitioner which has violated the rights of one Humphreys James Okumu Barasa, and while nothing turns on this point, the said Barasa not being a party to the petition, I will in closing make some observations regarding the alleged ownership of the motor vehicle in dispute.

30. From the documents annexed to PC Kieny's affidavit, the only thing that is certain is that it does not belong to the 1st respondent. The search of the motor vehicle records dated 28th November 2013, three years after it was given as a guarantee to the petitioner, shows the registered owner as **Muchogo Grace and Equity Bank Limited**. The transfer of the motor vehicle KAR 518 Q to Humphreys James Okumu Barasa bears the name and rubber stamp of **Equity Bank** as the owner. The third document relied on by the respondents is a sale agreement of the motor vehicle KAR 518Q made on 6th March 2010. The agreement is between one **George Kihoro Muya I.D. No. 21625201** and Humphreys James Okumu Barasa.

31. From these documents, the respondents want the court to believe that the motor vehicle was given to the petitioner on 17th June 2010 by the 1st respondent, while his father, one Humphreys James Okumu Barasa had purchased it just three months before, on 6th March, 2010; that the said Barasa only complained about his motor vehicle after three years, on 18th October 2013; and that official registration records as at 18th November 2013 showed that the person who was the registered owner of the vehicle was not the person who sold it to the alleged owner some three years before! It just does not add up, and it is not the sort of evidence that those charged with investigation of offences would be expected to present before a court of law.

32. Unfortunately for the petitioner, the discrepancy of evidence with regard to the ownership of the vehicle does not help its claim against the respondents. Its petition is therefore dismissed, but in the circumstances, each party shall bear its own costs of the petition.

Dated Delivered and Signed at Nairobi this 18th day of December 2014.

MUMBI NGUGI

JUDGE

Ms Munyaka instructed by the firm of Gikera & Vadgama & Co. Advocates for the petitioner

Mr Ndege & Ms Nyamweya instructed by the Director of Public Prosecution for the 2nd respondent

No appearance for 1st respondent