



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(NAIROBI MILIMANI LAW COURTS)

PETITION 44 OF 2011

MAYNARD MACKENZIE DANG'ANA
PETITIONER
VERSUS

COMMISISIONER OF POLICE 1ST
RESPONDENT

KENYA SHELL LIMITED..... 2ND
RESPONDENT

ANDREW GATHIMBA NGURE **INTERESTED**
PARTY

JUDGMENT

Introduction

1. This petition arises out of the seizure by the 1st respondent of Motor Vehicle Registration Number KAU 575L (hereafter the motor vehicle) which the petitioner alleges was sold to him and property in which passed to him, but which the 2nd respondent alleges was its property sold by a person who had no authority to do so and who is currently being prosecuted for various criminal offences related to the sale of the motor vehicle.

2. In his petition dated 18th March, 2011 and supported by his affidavit of the same date, the petitioner alleges violation of his fundamental rights and freedoms under Articles 27(1), 27(5), 28, 29(d), 29(f), 31(a), 35(1)(a), 40, 47 and 50 of the Constitution of Kenya and seeks the following orders:

- a) **A declaration that the Petitioner's rights to equal protection of the Law has been violated;**
- b) **A declaration that the property in Motor Vehicle Registration Number KAU 575L, has passed to the Petitioner**
- c) **That the Commissioner of Police direct the Officer in Charge of Kilimani Police Station to release the motor vehicle registration number KAU 575L to the Petitioner**
- d) **Costs of this Petition**
- e) **Such other or further reliefs that this Honourable Court may deem fit and just to grant.**

3. The 1st respondents did not enter appearance or file any pleadings in the matter while the 2nd respondent filed a Replying affidavit dated 8th April 2011 and a Further Replying Affidavit to the Interested Party's Reply dated 7th June, 2011.

4. The petitioner, 2nd respondent and the Interested Party filed their written submissions which they highlighted before me on 4th October 2012.

Background

5. The Interested Party purchased the motor vehicle sometime in 2009, from one Benson Wang'alwa and transferred it into his name. Soon thereafter, the petitioner approached him with an offer to purchase the vehicle and did purchase the vehicle from the Interested Party after confirming from a search at the Registrar of Motor Vehicles that the motor vehicle was registered in the name of the Interested Party. He states that he paid part of the purchase price but being unable to meet the full cost of the vehicle, he borrowed part of the purchase price from his employer, British American Asset Managers Ltd, and the motor vehicle was registered jointly in both the petitioner's and his employer's names.

6. Sometime in 2010, the 2nd respondent discovered that three of its motor vehicles, including the motor vehicle the subject of this petition, had been sold without its knowledge and consent. The 2nd respondent consequently filed a complaint with the Kilimani Police Station as a result of which the three motor vehicles were impounded and are still held at the said Police Station.

7. It appears that one Benson Wang'alwa, who had been employed as the 2nd respondent's Human Resources Manager, had obtained three original Log Books for the three motor vehicles including the Log Book for KAU 575L from the 2nd respondent during his tenure of employment. Investigations by the Criminal Investigations Department revealed that the motor vehicles had been transferred to diverse third parties.

8. Following the investigations and discovery of the unauthorised sales and transfers, criminal proceedings against the 2nd respondent's former Human Resources Manager were instituted in Kibera Chief Magistrate's Court Criminal Case Number 4450 of 2010. The case is still pending in court.

The Petitioner's Case

9. The petitioner contends that the motor vehicle registration Number KAU 575L is registered in his name and consequently, by virtue of Section 8 of the Traffic Act, Chapter 403, Laws of Kenya, unless the contrary is proved, he remains the lawful owner of the car. He contends that he carried out due diligence before he purchased the motor vehicle prior to purchasing it and the search conducted revealed that the motor vehicle belonged to the Interested Party. He should therefore not be faulted for the events that unfolded after that.

10. The petitioner relies on the provisions of **Section 31 of the Sale of Goods Act** in support of his case which states that, "*where the seller of the goods has a voidable title, the purchaser none the less acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect in title*" and contends that as he was not a party to the machinations of the said Benson Wang'alwa, he acquired a good title to the motor vehicle. He argues further that, in any event, the 2nd respondent had acknowledged in its replying affidavit that Benson Wang'alwa in his capacity as the Human Resources Manager had the power to dispose of its motor vehicles and consequently, on the authority of **Morjaria -v- Kenya Batteries (1981) Ltd & 2 Others (2002) KLR 406**, his ownership of the motor vehicle was undisputable as it was not incumbent upon third parties to find out if the internal processes of the 2nd respondent had been complied with.

11. The petitioner submits therefore that the seizure of the motor vehicle is an unconstitutional interference with his rights. The police seized the vehicle and have refused to release it and have therefore

violated his right to privacy under Article **31(b)**, his right to property under Article 40(3), and that the lack of a provision under Section 121 (1) of the Criminal Procedure Act for a person in his position to apply for the release of the motor vehicle, which he contends was seized arbitrarily, is a violation of his right under Article 47(1) of the Constitution.

The 2nd Respondent's Case

12. The position taken by the 2nd respondent in opposing this petition is that the issues raised by the petitioner in his submissions are *res judicata* in view of the ruling of Musinga, J (as he then was) made on 30th June 2011 on the petitioner's interlocutory application brought by way of Chamber Summons dated 18th March, 2011. I shall revert to the findings of the court in that ruling later in this judgment.

13. The 2nd respondent contended that none of the petitioner's fundamental rights had been violated, and the petitioner had not demonstrated how any of his rights had been violated. In any event, the rights guaranteed under the Constitution are not absolute but are subject to limitations, one limitation being the need for the prevention of crime. Further, the enjoyment of fundamental rights is subject to the rights and freedoms of others.

23. The 2nd respondent argues that if the petitioner had any grievance over the irregular sale of the motor vehicle KAU 575L, he should seek redress from the Interested Party and/or Benson Wang'alwa. No relevant evidence has been placed before the court with regard to the alleged unlawful seizure of the motor vehicle by the 1st respondent, and by filing this petition, the petitioner is asking the court to fetter the discretion of the lower court in its determination of Kibera Chief Magistrate's Court Criminal Case Number 4550 of 2010 Republic -v- Benson Wang'alwa. The 2nd respondent therefore prayed that the petition be dismissed with costs.

The Interested Party's Case

24. According to the Interested Party, he obtained ownership of the motor vehicle from Benson Wang'alwa, the 2nd respondent's Human Resource Manager; that he paid the purchase price for the motor vehicle to Benson Wang'alwa, executed the transfer form and transferred ownership of the said vehicle to himself. He contends that he purchased the said vehicle as an innocent purchaser believing that the said Benson Wang'alwa had purchased the vehicle from the 2nd respondent and was therefore entitled to sell it.

25. The Interested Party contends that the said Benson Wang'alwa, being the Human Resources Manager of the 2nd respondent, had authority to sell the motor vehicle to him, a fact, according to the Interested Party, which is corroborated by the 2nd respondent's Replying Affidavits. It was therefore not his fault that the motor vehicle was impounded by the Police and he should therefore be paid the costs of these proceedings.

Issues for Determination

26. The petitioner has brought this petition alleging violation of his rights under Articles 27(1), 27(5), 28, 29(d), 29(f), 31(a), 35(1)(a), 40, 47 and 50 of the Constitution. The issue that the court is called upon to determine is whether the facts presented demonstrate violation of the petitioner's rights, and if the answer is in the affirmative, whether he is entitled to the reliefs that he seeks. As is now trite law, he has an obligation to demonstrate which of his rights have been violated, and the manner in which they have been violated. See **Anarita Karimi Njeru –v-Republic (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**.

27. The basis of the petitioner's claim is the impounding and detention of motor vehicle registration number KAU 575L pending hearing and determination of **Kibera Chief Magistrate's Court Criminal Case Number 4550 of 2010 Republic –v- Benson Wang'alwa**. None of the parties disputes

that the motor vehicle was seized in accordance with the law, and is detained pursuant to the provisions of **Section 121(1) of the Criminal Procedure Code**. The section permits the seizure of goods the subject of criminal investigations and prosecution and provides as follows:

"When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation."

28. The petitioner argues that this provision is in violation of his right to fair administrative action as it does not contain provision for a person in his position to apply for release of his goods. However, the question arises as to how the law can provide for a person to apply for release of goods the subject of a criminal prosecution when the title to such goods is the very matter that is in dispute. As Musinga J correctly held at page 13 of his ruling in this matter with regard to the petitioner's title:

"A buyer who purchases goods from a seller who had no authority to sell acquires no better title to the goods than the seller."

29. The Learned Judge also held, correctly in my view, that

"I agree with the 2nd respondent that the provisions of Section 24 of the Sale of Goods Act cannot assist the Petitioner since Benson's title over the motor vehicle was void for all purposes."

30. In such circumstances where the petitioner acquired the vehicle through transactions that were 'void for all purposes' can he sustain a claim for violation of constitutional rights? The police seized the vehicle pursuant to a legitimate complaint regarding the sale to the Interested Party and the subsequent sale to the petitioner. That was a lawful exercise of their powers. They continue to hold the motor vehicle pending the completion of the criminal case against Benson Wang'alwa. They cannot, therefore, be accused of holding the motor vehicle unlawfully. If the circumstances under which they are holding the motor vehicle are lawful, then there is no basis for arguing that there has been a violation of any of the rights of the petitioner under the Constitution; and there is also no basis for ordering the release of the vehicle before completion of the criminal case.

31. The petitioner has argued in his submissions that the criminal process should not be used to ascertain ownership of the vehicle as there is a civil matter already lodged which is competent enough to determine the issue of ownership. I agree. Similarly, however, the petitioner should not come under the guise of a constitutional petitioner to have the issue of ownership of the motor vehicle determined in his favour. For this court to issue the declarations he seeks and to grant the reliefs sought would be to determine the issue of ownership without the evidence of all the parties being tested through cross-examination in a forum appropriate for the purpose. He argues that he is protected by the provisions of the Sale of Goods Act as the title to the motor vehicle was voidable but had not been avoided at the time of the sale to him. Perhaps. However, these are matters that are best tried in a civil court where all the parties can call evidence and have that evidence properly tested through cross-examination. Before that, however, the prosecution of the person who allegedly transferred the vehicles unlawfully must be complete, and the court has no basis to interfere.

32. In the circumstances, I find no merit in this petition and the same is dismissed. Given the circumstances, however, I make no order as to costs.

33. I am greatly indebted to the parties for their diligence in preparing and presenting their respective pleadings and submissions in the matter.

DATED at NAIROBI this 21st day of January 2013

**MUMBI
JUDGE**

NGUGI

DATED and DELIVERED at NAIROBI this 28th day of January 2013

**D.
JUDGE**

S.

MAJANJA

Mr. Wandabwa instructed by the firm of Wandabwa & Co. Advocates for the Petitioner

Ms. Otaba instructed by the firm of Hamilton Harrison & Mathews Advocates for the 2nd Respondent

Mr. Oluga instructed by the firm of Oluoch & Associates Advocates for the Interested Party.