



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 244 OF 2012

RAMADHAN MWINYISHEE INDIYAAPPLICANT

AND

THE DIRECTOR

CRIMINAL INVESTIGATIONS DEPARTMENTRESPONDENT

IBRAHIM KIMERAINTERESTED
PARTY

JUDGMENT

Introduction

1. The petitioner has moved to this court alleging violation of his right to property under Article 40 of the Constitution. The alleged violation occurred as a result of the seizure of his motor vehicle, Mercedes Benz Model CDI 320 with Chassis Number WDC1641222A505473 and Engine Number 64294040820315.
2. In his petition dated 7th June 2012, and supported by his affidavit of the same date and a supplementary affidavit sworn on 21st December 2012, the petitioner seeks the following orders:
 1. ***A declaration that the Respondent's arrest, impounding and continued detention of motor vehicle make Mercedes Benz model CDI 320 with Chassis Number WDC1641222A505473 and engine number 64294040820315 and black in colour is an infringement of Petitioner's right to property under Article 40 of the Constitution hence unconstitutional.***
 2. ***A declaration that the Respondent's refusal, failure and or neglect to furnish the Petitioner with a written explanation containing reasons for the arrest, impounding and detention with a written explanation containing reasons for the arrest, impounding and detention of motor vehicle make Mercedes Benz model CDI 320 with Chassis Number WDC164222A505473 and engine number 64294040820315 and black in colour is an infringement to the Petitioner's right to fair administrative action under Article 47 of the constitution hence unconstitutional.***
 3. ***A declaration upholding the Petitioner's right of ownership and entitlement to the possession of the said motor vehicle make Mercedes Benz model CDI 320 with Chassis Number***

WDC1641222A505473 and engine number 64294040820315 and black in colour and an Order for the immediate release of the said motor vehicle to the Petitioner.

4. **Pending the hearing and determination of this Petition, Conservatory Orders do issue in terms of the chamber Summons filed herewith and upon hearing and determination of the Petition, an injunction do issue restraining the Respondent by himself, his employees, officers, servants, agents or by any other person whomsoever acting on his behalf from removing, transferring, re-locating, alienating, disposing nor in any other way interfering or dealing with the said motor vehicle make Mercedes Benz model CDI 320 with Chassis Number WDC1641222A505473 and Engine no. 64294040820315 and black in colour.**
5. **This Honourable court do issue Orders and give such directions as it may deem mete, just and appropriate in the circumstances of this case.**
6. **The costs of this Petition be awarded to the Petitioner.**

7. The respondent opposes the petition and has filed an affidavit in opposition thereto sworn by Julius Kenduywa, a Chief Inspector of Police No. 231109 on 4th November 2012 and a further affidavit sworn on 7th May 2013. Both parties filed written submissions dated 11th April and 7th May 2013 respectively which they requested the court to rely on in rendering its judgment.
8. The facts leading to this petition as set out in the petition and affidavit in support are that on 11th May 2011, police officers from the respondent's Interpol Section impounded the petitioner's motor vehicle, namely **Mercedes Benz model CDI 320 with Chassis Number WDC1641222A505473 and Engine no. 64294040820315** (the motor vehicle) on suspicion that it had been stolen from the United Kingdom.

According to the petitioner he had purchased the motor vehicle for Kshs Three Million Two Hundred Thousand only **Kshs3,200,000** on or about 27th May 2010 from the Interested Party who operates a business of sale of motor vehicles at his Car Bazaar known as **Pendoki Motors Limited** located in Hurlingham Area, Nairobi.

9. At the time of the purchase, the motor vehicle had not been registered in Kenya. The petitioner, who was working in Juba, South Sudan, sought the assistance of one of the workers at the Interested Party's Bazaar, one Peter Ndolo, to pursue the registration for him, and in March 2011, he was informed that the registration had been effected and he should collect the number plates marked KBP 753A. He did collect the number plates and affixed them on the motor vehicle. He states that shortly thereafter, in May 2011 officers from the respondent's Interpol Section impounded the motor vehicle on the allegation that it had been stolen in the United Kingdom and was therefore under active investigations by Interpol.
10. The petitioner alleges that he duly informed the Interested Party that the motor vehicle had been impounded; that the Interested Party assured him that the vehicle was not stolen and promised to follow up and presumably secure the release of the motor vehicle from the respondent; that though he has made several efforts to have the motor vehicle released to him or to establish the real reason for its arrest and continued detention, the respondent and its officers have refused to give him the information or to release the vehicle to him. His letters to the respondent, written personally and through his Advocates, have gone unanswered.
11. The petitioner contends therefore that the respondent does not have good reasons for the continued detention of the motor vehicle; that he believes there are no on-going investigations over the said motor vehicle either locally or by Interpol; and that the period of one year during which the motor vehicle has been in the custody of the respondent has been more than adequate for conducting and concluding investigations, and preferring charges and prosecuting the person responsible for the theft of the motor vehicle.
12. He asserts therefore that the respondent's conduct with regard to the motor vehicle is a flagrant

infringement of his constitutional rights guaranteed under Article 40 as read with Article 260 of the Constitution; that there has also been a breach of Article 47 through the failure to give any plausible reasons for the detention or continued detention of the said motor vehicle; and by failing to respond to his letter or the letters from his Advocates on the subject.

13. The petitioner submits therefore that as the motor vehicle has not been found to have been unlawfully obtained by a court of law exercising either civil or criminal jurisdiction, impounding it and continuing to detain it amounts to an arbitrary deprivation of property contrary to Article 40(3) of the Constitution.
14. In his response to the respondent's replying affidavit, the petitioner contends that he had left the motor vehicle with one **Swabra Ahmed** whom he had also requested to follow up the registration with the said **Peter Ndolo**
15. He contends that no evidence had been provided to show that the motor vehicle was under investigation by Interpol, or that it belongs to someone in the United Kingdom. He avers that if the registration of the motor vehicle was irregular as alleged by the respondent, then such irregularity was committed by the said Peter Ndolo to whom he had assigned the sole responsibility of registering the vehicle, and it is the said Peter Ndolo who should be held responsible for the irregular registration. He notes that while he has disclosed the seller of the motor vehicle, no attempt has been made to charge the individuals who sold the motor vehicle, and that it is surprising that the respondent is only interested in impounding the motor vehicle.

The Respondent's Case

16. The respondent's case as set out in the affidavits sworn by Chief Inspector Kenduywa is that the motor vehicle in question was impounded and detained because it had been stolen from the United Kingdom and Interpol was carrying out investigations with regard to the theft.
17. According to the respondent, the petitioner cannot be said to be the true and lawful owner of the motor vehicle as, in accordance with the provisions of Section 23(1) of the Sale of Goods Act, a person who sells goods without the authority or consent of the owner of such goods passes no better title than he had.
18. The respondent's case is premised on their version of events leading to the impounding and detention of the motor vehicle. According to the respondent, in June 2011, a person desirous of purchasing the motor vehicle came with a log book to the respondent's headquarters and requested the respondent to verify the status of the subject motor vehicle, a Mercedes Benz Model CDI 320, Chassis No WDC1641222A505473 and Engine No 64294040820315, black in colour.
19. The respondent states that a search of the database of stolen motor vehicles revealed that the motor vehicle was stolen from the United Kingdom on 19th August 2009. Consequently, the respondent asked the purported owner to bring the motor vehicle to the CID Headquarters in order to confirm the details, but this was not done for the next seven days, and so its registration number was circulated to all police officers to look for it.
20. According to the respondent, on 22nd June 2011, one Felix Limo from Car Soko bazaar where the vehicle had been displayed for sale brought the vehicle together with a lady who presented herself as the owner of the car; that when asked to produce documents of ownership, she could not, and so the vehicle was detained at CID Headquarters.
21. CI Kenduywa avers that on 22nd June 2011 Interpol London, United Kingdom, were informed of the impounded motor vehicle and asked to provide the circumstances surrounding its loss, and Interpol UK confirmed that the vehicle had been reported stolen from Daimler Fleet Management UK on 19th August 2009. The respondent has annexed to the Further Affidavit of Chief Inspector Kenduywa sworn on 7th May 2013 several email communications between the respondent and the

London Office of Interpol regarding the theft of the subject motor vehicle.

22. The respondent also contends that its investigations revealed that the motor vehicle had been irregularly registered in Kenya, a fact confirmed by a letter dated 14th October 2011 from the Kenya Revenue Authority; that not being properly registered in Kenya, the motor vehicle cannot be used, and it was therefore legally detained at the CID headquarters, and the petitioner only turned up to claim the motor vehicle five months after it had been detained.
23. The respondent alleges therefore that the motor vehicle is the property of the United Kingdom and cannot be released to the petitioner; that in March 2012, Interpol London wrote to Interpol Kenya indicating that they had instructed a company known as Enterprise Rent a Car, whose contact persons are Ronda Fulfor and Aggo Kyriacu and David Burns from Harlequin Investigations, to recover the motor vehicle. The respondent therefore submits that, in light of the above facts, the police were discharging their duty independently after conducting their investigations as mandated by Article 244 of the Constitution of Kenya, 2010 and Section 24 of the National Police Service Act.
24. The Interested Party who, according to the petitioner, sold the motor vehicle at issue to him, did not file any pleadings or participate in any way in these proceedings.

Determination

25. The issue for determination in this matter is whether there has been a violation of the petitioner's right to property under Article 40 by the respondents. This Article provides that:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

26. Article 260 of the Constitution defines 'property' as including 'any vested or contingent right to, or interest in or arising from, goods or personal property'. The petitioner is thus entitled to own property, whether real or personal, in any part of Kenya, and to have his right to the said property protected. In order to demonstrate a violation of his right under Article 40 in respect of the motor vehicle the subject of this petition, however, the petitioner must demonstrate that he is the rightful owner of the motor vehicle.
27. What do the facts before me show with regard to the ownership of the motor vehicle? The petitioner has averred that on or about 27th May 2010, he purchased the motor vehicle, which had not yet been registered in Kenya, for the sum of Kshs Three Million Two Hundred Thousand only Kshs3,200,000 from the Interested Party. The Interested Party operates a business of sale of motor vehicles at his Car Bazaar known as Pendoki Motors Limited located in Hurlingham Area, Nairobi. He therefore asserts that he is the rightful owner of the vehicle, and that the actions of the respondent in impounding it are a violation of his right to property.
28. The respondent counters that the motor vehicle was stolen from the United Kingdom; that the petitioner has no title to it as the seller had no title that he could pass on to him in light of the fact that the motor vehicle was stolen. The respondent has attached email communication which it states it exchanged with Interpol, United Kingdom.
29. It is not in dispute that the petitioner purchased the motor vehicle from the Interested Party, one Ibrahim Kimera. It is also not disputed that he did pay the total amount due as purchase price, and that he was given possession thereof. On the face of it therefore, he has a legitimate claim to ownership of the motor vehicle, and unless adequate reasons are preferred, any act of the respondent that deprives him of the motor vehicle amounts to an unlawful deprivation of property,

and a violation of his right under Article 40.

30. The respondent has questioned the right of the Interested Party to sell the motor vehicle to the petitioner, alleging that the motor vehicle was stolen. To support this allegation, the respondent has annexed copies of emails it states it exchanged with Interpol, United Kingdom, relating to the motor vehicle and the alleged theft thereof. It has also annexed to its replying affidavit a letter from the Kenya Revenue Authority which states that the motor vehicle was *'handled contrary to provisions of the East African Community Customs Management Act'*, and that it was irregularly allocated a vehicle registration number.
31. The evidence before me displays an apparent disinterest by both parties in pursuing the party who appears to have the answers to all the questions pertaining to the matter before the court. The petitioner, though fully aware of the party from whom he bought the motor vehicle, and whose employees pursued the allegedly irregular registration of the motor vehicle, has not taken any steps to institute civil proceedings to recover his money from the seller, as he no doubt has a right to do under the law.
32. On its part, the respondent, though it alleges that the motor vehicle was stolen, has not taken any steps to bring criminal proceedings against the Interested Party, whose particulars it has from the documents filed by the petitioner. As correctly argued by the petitioner, the interest of the respondent in this matter cannot be limited only to recovery of the motor vehicle. Its primary obligation is detection and prevention of crime, and where a crime is disclosed, prosecution therefor through the office of the Director of Public Prosecutions.
33. The court is under a duty to balance the conflicting interests that are evident in this matter. On the one hand are the interests of the petitioner in the motor vehicle which he bought and therefore has a legitimate claim to. On the other is the public interest in the respondent performing its function of detecting and preventing crime. The courts in Kenya have recognised the importance of achieving this delicate balance between the private and the public interest - see **R -vs- Kenya National Human Rights Commission ex parte Uhuru Muigai Kenyatta High Court Misc Appl. No. 86 of 2009** and **R -vs- Judicial Service Commission ex parte Pareno (2004) 1 KLR** relied on by the respondent.
34. The respondent has alleged that the motor vehicle was stolen, and that it was unlawfully or irregularly registered. It has, or ought to have, all the information that it requires in order to charge in court those who committed criminal offences in relation to the motor vehicle. This would enable the issue of the entitlement or lack of entitlement of the petitioner to be determined once and for all. The respondent cannot legitimately continue to hold the motor vehicle without taking any steps to ensure that those who are alleged to have stolen and sold it unlawfully, or of having registered it in contravention of the law, are brought to book.
35. In the circumstances, doing the best I can to balance the competing interests of the petitioner in the vehicle that he lays claim to and the public interest, represented by the respondent, that the petitioner, or indeed anybody else involved in the transaction pertaining to the motor vehicle, does not benefit from the proceeds of crime, the orders that commend themselves to me are as follows:
- 1. That the respondent does, within sixty (60) days from the date of this judgment, proceed to charge and prosecute those it deems responsible for the unlawful conversion and sale and/or registration of Mercedes Benz Model CDI 320 with Chassis Number DC1641222A505473 and Engine Number 64294040820315.***
 - 2. In default of No. (i) above, the respondent shall release the said motor vehicle to the petitioner forthwith.***
36. Each party shall bear its own costs of this petition.

Dated Delivered and Signed at Nairobi this 25th day of June 2013

MUMBI NGUGI

JUDGE

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

Mr. Njogu instructed by the Director of Public Prosecutions for the Respondent