



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 53 of 2012

CAROLINE MBEVI.....PETITIONER

VERSUS

KINGS CAPITAL.....1ST RESPONDENT

MINISTER OF INTERNAL SECURITY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioner filed this petition dated 21st February 2012 seeking various orders and declarations against the respondents. The petition is supported by an affidavit sworn by the petitioner sworn on the 21st of February 2012.
2. The petitioner's case is fairly straight forward. She avers that on the 5th of January 2012, employees of the 1st respondent accompanied by some administration police officers from Utawala Chief's Camp visited her residence and carried away assorted household goods including sofa sets, fridges and others valued at more than Ksh. 500,000.00 without following the due legal process. She states that the basis of the 1st respondent's action could have arisen out of a debt she owed the 1st respondent; that she had earlier on borrowed a loan of Ksh.32,400.00 from the 1st respondent and paid part of it; that she had an outstanding debt of Ksh. 11,000.
3. The petitioner denied ever having a chattels mortgage with the 1st respondent and contended that the actions of the 1st respondent and agents of the 2nd respondent violated her right to property and right to privacy as provided for under Articles 40 and 31 of the Constitution respectively. She therefore asked the court to issue orders and declarations, among others, for a permanent injunction against the respondents, their servants, agents or representatives from entering, attaching, selling and/or in any manner interfering with the household goods taken from her house in Utawala Estate, a declaration that her rights under Articles 31 and 40 of the Constitution had been infringed by the 1st and 2nd respondents, and an order for compensation and costs.
4. The respondents opposed the petition. The 1st respondent filed an answer to the petition dated 22nd March 2012 while the 2nd and 3rd respondent filed grounds of opposition dated 7th March 2012.

The 1st Respondent's Case

5. While acknowledging that its employers visited the petitioner's residence on 5th January, 2012, the 1st respondent contends that they were voluntarily allowed entry by the petitioner and they called for the assistance of the police only after the petitioner became rowdy and threatened to harm them.
6. The 1st respondent also admitted taking away the petitioner's household goods valued at Ksh. 130,000.00 which had been registered as collateral for a loan of Ksh. 30,000.00 advanced by the 1st respondent to the petitioner for the purposes of expanding her supplies business; that the petitioner had executed a chattel mortgage, which was registered on 11th January 2012, in favour of the 1st respondent.
7. According to the 1st respondent, though the loan was repayable within a month, the petitioner defaulted and the 1st respondent issued a demand letter. Following the demand, the petitioner paid Ksh. 10,000.00, leaving a balance of Ksh. 35,000.00 which continued to accrue interest at a rate of 14% per month; that the 1st respondent issued a second demand notice which the petitioner failed to meet and the 1st respondent traced her to her residence at Utawala Estate and repossessed the household goods that had been offered as collateral; that the said goods were later on sold through a public auction to the highest bidder, but that despite the sale a balance of Kshs 8,000 remained and a demand has already been issued to the petitioner.
8. The 1st respondent submitted that this court has no jurisdiction to hear and determine this petition as the petitioner has not demonstrated how any of her constitutional rights has been violated and in any event the facts giving rise to this case are commercial in nature which ought to be canvassed in a commercial court. The 1st respondent relied on the case of **Misc Civ. Appl. 7 of 2006 Richard Nduati Kariuki -v- Leonald Nduati Kariuki and Another (2006) eKLR**.
9. With regard to the alleged violation of the petitioner's property rights and privacy by the officers of the 2nd respondent, the 1st respondent submitted that the officers had been brought in to provide security after the petitioner and her husband became unruly, and the officers did not take any of the petitioner's household goods.
10. The 1st respondent also argued that the reliefs sought by the petitioner could not be granted: the household goods had been sold by public auction a month before the filing of the petition and an injunction could not issue to prevent that which has already taken place. He relied on the case of **Peter Kinuthia Mwangi -v- Malewa Ranching Company Ltd, Nakuru HCC No. 310 of 1998**.

The 2nd and 3rd Respondent's Case

11. Two main points were raised by the 2nd and 3rd respondents in their submissions in opposition to this petition. They argued, first, that the petitioner had failed to show how her rights under Articles 31 and 40 of the Constitution had been violated. They relied in this regard on the cases of **Lt Col. Peter Ngari Kagume & 7 Others v Attorney General Applic No. 128 of 2006** and **Anarita Karimi Njeru -v- Republic (1976) KLR 154**.
12. The second argument made by the 2nd and 3rd respondents, which echoes that of the 1st respondent, is that the issue in this matter is contractual in nature, arising as it does from a loan agreement between the petitioner and the 1st respondent. They submitted therefore that the matter can only be dealt with as a matter of contract and not as a constitutional petition. They also contended that in any event, the orders sought could not be granted against them as they had been wrongly joined in the proceedings.

Findings

13. From the facts and submissions before me, I take the view that there is no dispute on the facts. The petitioner had requested and been granted leave to respond to the replying affidavit filed by the 1st respondent, but eventually no affidavit was filed by the petitioner.

14. What the facts disclose is that the petitioner had, on the 23rd of September 2011, applied for a loan of Kshs 30,000 from the 1st respondent. A copy of the application form together with the letter containing the terms of the contract with the 1st respondent was produced by the 1st respondent as annexures 'KCL' '1' and '2' annexed to the affidavit of Naomi Njuguna sworn on the 22nd of March 2012. The rate of interest for the loan was stated to be 8% per month, but which would increase by 6% if the amount borrowed was not repaid within a month, making the total interest payable per month 14%. According to the respondent, the petitioner had executed a chattels mortgage giving her household goods as collateral. The court notes, however, that the chattels mortgage was made and signed on the 11th of January, 2012, about a week after the seizure of the petitioner's goods.

15. In any event, the petitioner, who admits in the affidavit in support of the petition dated 23rd February 2012 that she had borrowed Kshs 32, 400 from the 1st respondent, defaulted in repaying the loan and after the issuance of a demand notice, the respondent had on the 5th of January 2012 attached the petitioner's goods worth, according to the 1st respondent Kshs 130,000.00 . According to the respondent, which was not disputed by the petitioner, the goods were sold by public auction on the 21st of January 2012, about one month before the petition was filed. Although the petitioner had been granted leave to respond to the 1st respondent's replying affidavit, she did not do so and the averments by the 1st respondent therefore stood unchallenged.

16. The single issue for determination in this matter is whether the facts as presented disclose violation of the petitioner's constitutional rights under Articles 31 and 40 of the Constitution or at all.

17. Article 31 of the Constitution provides as follows:

Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

18. From the material before me, there is nothing that discloses a violation of the petitioner's rights under this Article. She had voluntarily entered into a contract giving her household goods as security for the loan. While she disputes the chattels mortgage on the basis of which the seizure of her property took place, the letter of offer dated 23rd September 2011 indicates at paragraph 2 of the terms and conditions of the loan that the amount advanced would be secured by a chattels mortgage for the business and household assets and a personal guarantee of the petitioner and one Agnes Mutua. That being the case, the seizure of her property from her house was an incident of the execution of the terms of her contract with the 1st respondent, and no violation of the petitioner's constitutional rights is disclosed.

19. The petitioner also alleges violation of her right to property under Article 40 of the Constitution. This Article guarantees to everyone the right, either individually or in association with others, to own property in any part of Kenya, and not to be arbitrarily deprived of property without compensation.

20. The seizure of the petitioner's property was in execution of the loan agreement between her and the 1st respondent. While the presence of the administration police is admitted by the 1st respondent, it has not been disputed by the petitioner that, as asserted by the 1st respondent, they did not take away her goods and they were only called in when, in the words of the 1st respondent, the petitioner and her husband 'became unruly.'

21. Clearly, the basis of the petitioner's claim is her contract with the 1st respondent. If she was aggrieved by the actions of the 1st respondent in attaching her goods in realization of the security that she had herself provided, then her cause of action lay in a claim under contract law, not in a constitutional petition for alleged violation of constitutional rights.

22. It is now well settled in our law that a constitutional court cannot be used as a general substitute for the normal procedures in cases where those procedures are available somewhere else. See **Booth Irrigation –v- Mombasa Water Products Ltd, HCC Misc 1052 of 2004.**

Conclusion

23. Ordinarily, I would leave the matter at that point, but several aspects of this matter cause me serious disquiet. The parties entered into an agreement for a loan of Kshs 30,000.00 to the petitioner at a rate that is clearly usurious: the question arises as to the basis on which one can charge interest at 8 per month, and upon default, increase the rate to 14% per month. One may also question how the petitioner's goods, attached on the 5th of January 2012, could have been attached on the basis of a chattels mortgage dated 11th January 2012, six days after the seizure of the goods. The court notes also that while the petitioner borrowed Kshs 32,400 and had already paid Kshs 11,000 before the seizure of the goods, her goods worth Kshs 130,000 were seized and sold, still leaving her indebted to the respondent, as they state, in the sum of Kshs 8,000.00.

24. These are questions that require investigation and tendering of evidence, and they cannot be properly tried by way of a constitutional petition. The petitioner should consider having the matters adjudicated in an ordinary claim under contract where the issues can be dealt with appropriately.

25. This petition is hereby struck out with no order as to costs.

Dated, Delivered and Signed at Nairobi this 22nd day of November 2012

**MUMBI NGUGI
JUDGE**

Ms Gikonyo for Mr. Nzioki instructed for J.T. Nzioki Advocates
Mr. Mahinda instructed by Gathara Mahinda for the 1st respondent

Mr. Muimbo instructed by Attorney General for 2nd and 3rd respondent

**MUMBI NGUGI
JUDGE**