



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 44 OF 2011

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ARTICLE 19, 20, 21, 23 AND 262 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL UNDER
ARTICLES 27(1), 27(5), 28, 29(D), 31(A), 31(B), 35(1A), 40, 47 AND 50 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF: UNLAWFUL SEIZURE AND ILLEGAL DETENTION OF MOTOR
VEHICLE REGISTRATION NUMBER KAU 575L**

BETWEEN

MAYNARD MACKENZIE

DANG'ANA.....PETITIONER

AND

COMMISSIONER OF POLICE.....1ST
RESPONDENT
KENYA SHELL LIMITED.....2ND
RESPONDENT
ANDREW GATHIMBA
NGURE.....INTERESTED PARTY

RULING

The petitioner’s application dated 18th March, 2011 seeks the following orders:

- “1.
2.
3.
4. **Pending the hearing and determination of this petition an interim measure of protection do issue against the respondents, by themselves, their employees, servants and/or agents from interfering with the applicant’s right to his personal property, to wit, motor vehicle registration number KAU 575L and that the said motor vehicle be released to the applicant forthwith.**
5. **Such further or other orders that this honourable court may deem and just to grant.**
6. **The costs of this application be provided for.”**

The application was brought pursuant to the provisions of **Articles 22, 27(1), 27(5), 28, 29(d), 31(a), 31(b), 35(1a), 40, 47 and 50** of the **Constitution of Kenya** as well as **rules 20 and 21** of the **Constitution Of Kenya (Supervisory Jurisdiction And Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice And Procedure Rules, 2006** and **Section 3A** of the **Civil Procedure Act**.

The petitioner’s affidavit in support of the application may be summarized as hereunder.

On or about 2009 the petitioner approached the interested party with the intention of purchasing his motor vehicle registration number **KAU 575L**, a Peugeot station wagon by make (hereinafter referred to as “**the motor vehicle**”) and the interested party agreed to sell the same. The petitioner caused search to be conducted at the Registry of Motor Vehicles and confirmed that the motor vehicle was registered in the name of the interested party. On 13th July, 2010 the petitioner and the interested party entered into a sale agreement in respect of the motor vehicle. The agreed purchase price was Kshs.480,000/=. The petitioner paid part of the purchase price and the balance thereof was financed by his employer, British American Insurance Company Kenya Limited. The registration of the motor vehicle was therefore done in the joint names of the petitioner and the said insurance company.

Sometimes in September, 2010 the interested party telephoned the petitioner and informed him that the

2nd respondent had lodged a claim with the police concerning the motor vehicle. The 2nd respondent had alleged that the motor vehicle had been improperly transferred to the person who owned it immediately prior to the interested party. Since the police were planning to impound the motor vehicle the petitioner decided to drive it to Kilimani Police Station. That was done on 3rd October 2010. Since then the police have refused to release the motor vehicle to the petitioner and that refusal prompted the filing of the petition and this application.

The petitioner states that he is the lawful owner of the motor vehicle and it ought to be released to him. He further states that if there is any dispute as to who the previous owner of the same was, the dispute is between the 2nd respondent and the interested party and/or a third party.

The 1st respondent did not enter appearance and neither did he file any replying affidavit. The 2nd respondent filed a replying affidavit that was sworn by **Catherine Musakali**, its Company Secretary. She stated that the motor vehicle together with two others registration numbers KAU 692A and KAU 694A were purchased from Marshals East Africa Limited in the year 2004. The vehicles were lawfully registered in the name of the 2nd respondent. In or about September, 2010 the 2nd respondent became aware that the three motor vehicles had been sold without its knowledge or consent. Internal investigations were conducted and it was established that on or about 6th November, 2009 the 2nd respondent's former Human Resources Manager, **Benson Wangalwa**, had obtained the original log books for the said motor vehicles from one Dorothy Onyango who is the 2nd respondent's Administrator in its legal department. The said Benson Wangalwa had falsely represented to Dorothy Onyango that he had been duly authorized to dispose of the motor vehicles.

When it became clear that the motor vehicles had been sold without the 2nd respondent's knowledge or consent a complaint was filed at Kilimani Police Station. Meanwhile, Benson Wangalwa resigned from the 2nd respondent's employment. The police acted on the 2nd respondent's complaint and recovered the three motor vehicles.

Benson Wangalwa was arrested and charged with theft of the motor vehicles in **Criminal Case No. 4450 of 2010** in the Chief Magistrate's Court at Kibera. Consequently, the 2nd respondent averred that the registration of the petitioner as the alleged owner of the motor vehicle was illegal as the car was at all material times the property of the 2nd respondent. The 2nd respondent is not in possession of the said motor vehicle and neither does it have control over the same since it is in the hands of the police as an exhibit in the aforesaid criminal case.

In the petition the petitioner alleged that the respondents had violated his constitutional rights and particularized, *inter alia*, the following rights as having been violated:

- (i) **The right to equal protection and equal benefit of the law.**
- (ii) **The right not to have his property ceased**
- (iii) **The right not to have the state deprive him of his property or interest in or right over his property or**
- (iv) **The right to administrative action that is expeditious, efficient, lawful, reasonable and**

procedurally fair.

(v) The right to have any dispute determined in a fair and public hearing before a court of law.

The 2nd respondent denied having violated any of the petitioner's constitutional rights as alleged.

The interested party is an employee of the 2nd respondent. He stated that in November 2009 he tendered for the purchase of his employer's motor vehicles that were being sold but he was not successful in getting any of them. He then approached Mr. Willis Onyango, the 2nd respondent's Human Resource Assistant with a view to purchasing the said motor vehicle which had been damaged. The said Mr. Onyango referred him to Mr. Benson Wangalwa, the 2nd respondent's Human Resources Manager who confirmed to him that he had purchased the motor vehicle and was willing to sell it to him at a good bargain. Benson sold the vehicle at an agreed price of Kshs.250,000/=. The interested party paid the full purchase price and two days after payment Benson issued him with the original log book and a transfer form duly signed and stamped by the 2nd respondent. However, he did not give the interested party the sale agreement.

The interested party further stated that his intention of buying the motor vehicle was to repair and resell it. In November, 2009 he sent employees of a company known as Auto Assurance to collect the vehicle from the 2nd respondent's depot but the Deputy Manager refused to release the same. The interested party telephoned Benson Wangalwa and informed him of the happenings and Benson assured him that he will have the motor vehicle released in an hour's time, which was done. The interested party later approached the 2nd respondent requesting them to insure the motor vehicle which was done and he was issued with an insurance cover through one Mr. Jimmy Mwafodo. The interested party paid for the insurance premium amounting to Kshs.43,000/=. It is not clear why the interested party was asking the 2nd respondent to have the vehicle insured if he had already been issued with the original log book and a transfer form.

The interested party confirmed that he sold the motor vehicle to the petitioner and handed over to him all the documents of ownership that had been passed over to him by Benson Wangalwa. The interested party verily believed that Mr. Benson Wangalwa had properly acquired the said motor vehicle.

The petitioner, the 2nd respondent and the interested party filed their respective submissions which I have carefully perused.

Mr. Wandabwa for the petitioner submitted that the petitioner is the lawful owner of the motor vehicle and it ought to be released to him forthwith. He cited the provisions of **Section 8** of the **Traffic Act** which state that:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

He added that the petitioner exercised due diligence before he purchased the car by carrying out a search at the Motor Vehicles Registry which showed that it was registered in the name of the interested party. Counsel further cited **Section 24** of the **Sale of Goods Act Cap 31** which provides that:

“When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller’s defect of the title.”

He stated that in paragraph 14 (d) of the 2nd respondent’s replying affidavit it was acknowledged that Benson Wangalwa being the Human Resources Manager, had power to dispose of vehicles. As far as the interested party or the petitioner were concerned it was not incumbent on any of them to find out if the 2nd respondent’s internal processes had been complied with. In support of that submission he cited the case of **MORJARIA v KENYA BATTERIES ([1981] LTD & 2 OTHERS [2002] KLR 406**. In that case, the court held that whether a company has or has not complied with its internal procedures as to borrowing or execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company unless he has had actual knowledge of them or there are suspicious circumstances putting him on enquiry.

Counsel submitted that the petitioner’s right to his motor vehicle had been unlawfully interfered with and added that the pending criminal case cannot be used to determine the ownership of the motor vehicle as the petitioner’s right of ownership of the same is unassailable.

The 2nd respondent submitted, *inter alia*, that Benson Wangalwa having stolen the motor vehicle could not have passed good title to anyone who purported to purchase the same from him. In response to the provisions of **Section 8** of the **Traffic Act**, Mrs. Otaba for the 2nd respondent submitted that evidence had been adduced to disprove the petitioner’s contention that he was the lawful owner of the motor vehicle. Counsel cited the provisions of **Section 23(1)** of the **Sale of Goods Act** which states that:

“Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”

Since Benson Wangalwa had no title to the motor vehicle, none of the subsequent purchasers can claim to be the lawful owners of the same, she added. Mrs. Otaba further submitted that **Section 24** of the **Sale of Goods Act** has no application to the circumstances of this case for the reason that Benson Wangalwa’s title to the motor vehicle was void *ab initio* and not voidable.

From the affidavits on record, it is clear to me that Mr. Benson Wangalwa sold the motor vehicle in question to the interested party without consent and/or knowledge of the 2nd respondent. There is no dispute that the motor vehicle initially belonged to the 2nd respondent. The sale agreement that was executed between Mr. Wangalwa and the interested party, if at all, was not shown to the court. The interested party stated in paragraph 7 of his replying affidavit that the sale agreement has never been signed by the purported vendor. It is instructive that it is Mr. Wangalwa who procured the transfer of the motor vehicle from the 2nd respondent’s name to that of the interested party. When the 2nd respondent realized that the motor vehicle and two others had been unlawfully sold by Benson, a complaint was filed with the police. Benson was thereafter arrested and charged in a criminal case which is still pending before court.

In the circumstances as aforesaid, did the interested party acquire good title over the motor vehicle which he could in turn pass on to the petitioner? I do not think so. There is no evidence whatsoever that Benson had purchased the motor vehicle from the 2nd respondent. There is no material before the court from which it can be inferred that the 2nd respondent by its conduct is precluded from denying Benson’s

authority to sell the motor vehicle. A buyer who purchases goods from a seller who had no authority to sell acquires no better title to the goods than the seller had. Benson's title to the motor vehicle was not voidable, it was void *ab initio*. **JOWITT'S DICTIONARY OF ENGLISH LAW** explains the word "void" as follows:

"An agreement or other act is said to be void when it has no legal effect, or not the legal effect which it was intended to produce... An act may be void either *ab initio* or *ex post facto*. Thus, if a contract is made without the true consent of the parties or for any immoral consideration it is void *ab initio*. NO person's rights can be affected by it, whether he is a party or a stranger. In the case of a contract which is void for illegality, immorality, or on a similar ground, if money has been paid as the consideration of its performance, the party who has paid it may repudiate the contract and recover it back at any time before performance. But when an illegal contract has been executed, money paid under it cannot usually be recovered."

The same dictionary explains the word "voidable" as hereunder:

"An agreement or other act is said to be voidable when one of the parties is entitled to rescind it, while until that happens it has the legal effect which it was intended to have. It can however, be disputed only by certain persons and under certain conditions, and the right of rescission may be abandoned by the party entitled to exercise it... If that person acquires rights under a voidable contract or other transaction without notice and for value, they cannot afterwards be put in a worse position by its being set aside. Herein a voidable contract differs from a void contract, for in the latter case no third person can acquire rights under the contract unless the party against whom it is void elects to affirm it."

Although it is not disputed by the 2nd respondent that Benson Wangalwa as the Human Resources Manager had mandate to deal with disposal of its motor vehicles, such mandate could only be exercised for the benefit of the 2nd respondent but not otherwise. 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.

Commenting on the word "void", Lord Denning in **MCFOY v UNITED AFRICA CO. LTD** [1967] 3 ALL ER 1169, stated:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

The police cannot be accused of unlawfully holding the motor vehicle. They are holding the same because of the pending criminal case against Benson Wangalwa. The motor vehicle cannot be ordered released to the petitioner before the finalization of the criminal case. Under **Section 178** of the **Criminal Procedure Code** if Benson Wangalwa is found guilty of stealing or unlawful acquisition of the motor vehicle, the trial court will be entitled to order restoration of the motor vehicle to the owner. I do not want to say much about the merits of the criminal case, that is a matter that is in the hands of the trial court. However, the facts disclosed by the parties so far do not reveal that the respondents have violated the petitioner's constitutional right as alleged in the petition. Consequently, I dismiss this application with costs to the 2nd

respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2011.

D. MUSINGA

JUDGE

In the presence of:

Jane – court clerk

Mr. Oluga for the Interested Party

No appearance for Petitioner

Mrs. Otaba for 2nd Respondent