



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

**Petition 1021 of 2007**

**HEIWUA AUTO KENYA LIMITED..... 1<sup>ST</sup> PETITIONER**  
**JOHN NJENGA KAMAU..... 2<sup>ND</sup> PETITIONER**  
**ELIZABETH WAMBUI RIMUI..... 3<sup>RD</sup> PETITIONER**  
**NAOMI WANJIKU KARANJA.....4<sup>TH</sup>**  
**PETITIONER**

**V E R S U S**

**THE OFFICE COMMANDING POLICE DIVISION,  
CENTRAL POLICE STATION.....1<sup>ST</sup> RESPONDENT**  
**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup>**  
**RESPONDENT**  
**THE CHIEF MAGISTRATE COURT NAIROBI..... 3<sup>RD</sup>**  
**RESPONDENT**  
**THE HON. ATTORNEY GENERAL..... 4<sup>TH</sup>**  
**RESPONDENT**

**J U D G M E N T**

Before me is a Petition dated 12<sup>th</sup> September, 2007 and filed on 13<sup>th</sup> September, 2007 by Nchogu, Omwanza & Nyasimi Advocates on behalf of the petitioners named as **HEIWA AUTO KENYA LIMITED (1<sup>st</sup> petitioner) JOHN NJENGA KAMAU (2<sup>nd</sup> petitioner) ELIZABETH WAMBUI RIMUI (3<sup>rd</sup> petitioner) and NAOMI WANJIKU KARANJA (3<sup>rd</sup> petitioner)**. The respondents are named as **THE OFFICER COMMANDING POLICE DIVISION, CENTRAL POLICE STATION (1<sup>st</sup> respondent), THE DIRECTOR OF CRIMINAL INVESTIGATIONS (2<sup>ND</sup> respondent) THE CHIEF MAGISTRATE COURT NAIROBI (3<sup>rd</sup> respondent) and THE ATTORNEY GENERAL (4<sup>th</sup> respondent)**.

The orders sought in the petition are as follows-

- (a) **A declaration that the charging and prosecution of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioner in Nairobi Chief Magistrate’s Court Criminal Case 1399 of 2007 and the 2<sup>nd</sup> petitioner in Nairobi Chief Magistrate’s Court Criminal Case No. 1491 of 2007 is unconstitutional, illegal null and void.**
- (b) **The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents be prohibited from prosecuting, continuing to prosecute the petitioners**

*or any of them or in any way adducing evidence in Nairobi Chief Magistrate's Court Criminal Case No. 1399 of 2007 and Nairobi Chief Magistrate's Court Criminal Case No. 1491 of 2007 or other cases arising or likely to arise from the search and seizure of the petitioners property on the 15<sup>th</sup> August, 2007.*

- (c) *The 3<sup>rd</sup> respondent be prohibited from commencing to take evidence continuing to take evidence, or continuing to take such evidence or in any way conducting proceedings in respect of Nairobi Chief Magistrate's Court Criminal Case 1399 of 2007 and Nairobi Chief magistrate's Criminal Case No. 149 of 2009 or other such cases as may arise out of the said search and seizure of the properties of the petitioners.*
  
- (d) *The 2<sup>nd</sup> Respondent do release forthwith documents, computer software and files seized from the 1<sup>st</sup> petitioner's office on 15<sup>th</sup> August, 2007 without any lawful authority or a warrant of search.*
  
- (e) *Or that (sic) such other orders as this honourable court shall deem just.*

The petition was supported by the affidavit sworn on 12<sup>th</sup> September, 2007 by **JONH NJENGA KAMAU**, the 2<sup>nd</sup> petitioner. It was deposed in the said affidavit inter alia that the 1<sup>st</sup> petitioner is a limited liability company registered in Kenya carrying on business in motor vehicles, motor spares, buying and selling, import and export, inter alia; that the 3<sup>rd</sup> and 4<sup>th</sup> respondents have an interest as directors of the 1<sup>st</sup> respondent; that on 15<sup>th</sup> August, 2007 an officer acting on the directions of the 2<sup>nd</sup> respondent entered the premises of the 1<sup>st</sup> petitioner at Anniversary Towers Nairobi without consent or permission and conducted a search and seized compute software, files and other documents; that the said officer did not have a search warrant as required under section 118 of the Criminal Procedure Code (**Cap. 75**); that under section 20(1) of the Police Act, a police officer investigating an offence can carry out a search without warrant only in cases wherein his opinion obtaining a warrant under section 118 of the Criminal Procedure Code would substantially prejudice the investigations; that the items seized herein were not items envisaged under section 20(1) of the Police Act; that the actions of the 1<sup>st</sup> respondent herein was unconstitutional, null, illegal and void as same was not grounded on provisions of statute or justifiable in a just and democratic society. It is further deposed that the seizure conducted by the 2<sup>nd</sup> respondent on 15<sup>th</sup> August, 2007 was devoid of legal basis and contravened fundamental rights and freedoms of the petitioners as protected under section 76 of the Constitution of Kenya. Therefore any proceedings arising from them were illegal, null and void.

The petitioners' counsel also filed written submissions on 4<sup>th</sup> December, 2007. In the written submissions, the petitioners reiterated the facts deposed in the above affidavit. Reliance was placed on the case of **A/G -Vs- DANHAI WILLIAMS & OTHERS (JAMAICA) 1997 UK PC 22** where in the Judicial Committee of the Privy Council cited with approval what was stated by Lord Carndon **CJ in ENTICK vs- CARRINGTON (1965) 2 WILS** that –

***“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does, he is a trespasser, though he does no damage at all, if he will tread upon his neighbour’s ground, he must justify it by law..... We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have.”***

It was further contended that at common law searches and seizures must be justified. On the situation in Kenya, section 76(1) of the Constitution was relied upon. It provides-

***‘76(1) Except with his own consent, no person shall be subjected to the search of his person or property or the entry by others on his premises.’***

It was contended that section 76(2) of the Constitution provided for the circumstances under which a public officer or person with lawful authority under the laws may conduct a search. It was contended that flowing from the provisions of section 74(2) of the Constitution some laws were promulgated by Parliament, such as the Criminal Procedure Code (**Cap. 75**) sections 118 and 119, and the Police Act (**Cap. 84**) section 20. Section 118 and 119 of the Criminal Procedure Code provide for searches through a warrant issued by the court. Therefore, any search without a search warrant would be illegal and a nullity.

Section 20 of the Police Act however, provides for situations where a police officer may search a person or premises without a warrant, provided that-

- (i) ***the officer shall carry with him, and produce to the occupier of the premises on request by him, his certificate of appointment.***
- (ii) ***If anything is seized he shall forthwith take or cause it to be taken before a magistrate within whose jurisdiction the thing was found, to be dealt with according to law.***

It was contended that the search contested herein did not abide by the above requirements of the law, and therefore violated the constitutionally guaranteed rights and freedoms of the applicants.

It was contended that in Kenya, the jurisprudence was that such violation of a constitutional right will normally result in an acquittal, irrespective of the nature of the evidence which may be adduced in support of the case. Reliance was placed on the case of **RONALD MANYONGE CHEPKUI –VS-REPUBLIC** Criminal Appeal No. 87 of 2006 Kitale, in which Ochieng J. stated-

***“.....As the Court of Appeal observed the jurisprudence appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced to support the charge.”***

Reliance was also placed on the case of **ANN NJOGU –VS-REPUBLIC** Misc. Criminal Application No. 551 of 2007 wherein Mutungi J. stated-

***“I must also add in line with the authorities cited before me.... With which I totally agree and associate myself with that upon determination that the constitutional rights of the applicants have been violated, any prosecution against them or any of them on the basis of the events for which attempted charges were being made this morning..... is null and void. And this is so and will remain so irrespective of the weight of the evidence that the police might have had in support of their***

***case. This is on the simple reason that such a prosecution would be based on an illegality and a null and void case.”***

It was contended that in the present case the respondents searched and seized the property of the applicants without a search warrant and without the petitioners consent contrary to sections 76(1) and (2) of the Constitution of Kenya. Therefore the purported prosecution of the petitioners or any of them in Nairobi Chief Magistrates Criminal Case No. 1399 of 2007 of 2007 and No. 1491 of 2007 or any other cases arising and or likely to arise from the search and seizure was unconstitutional, illegal, null and void.

In response to the petition, the respondents filed grounds of opposition on 3<sup>rd</sup> October, 2007. The grounds were as follows-

- 1. The application is not brought in the name of the Republic.***
- 2. Judicial Review Remedies are not available to the applicants.***

The respondents also filed a replying affidavit sworn by Isaac Okwara, a police Inspector on 23<sup>rd</sup> July, 2008. It was deposed in the said affidavit, inter alia, that under section 20(1) of the Police Act a police officer was mandated to search any premises without warrant. It was deposed that the deponent as investigating officer carried out investigations because of a complaint lodged by one **BETTY NDULU WAMBUA**. It was deposed that after investigations the deponent found that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners **JOHN NJENGA KAMAU** and **ELIZABETH WAMBUI RIMURA** had jointly obtained Kshs.550,000 from the complaint **BETTY NDULU WAMBUA** by way of two bankers cheques. It was further deposed that it was found that the 2<sup>nd</sup> petitioner had forged telegraphic transfer receipts from ABC Forex Bureau and a Bill of Lading from NYK Hidone Shipping Line.

The respondents also filed written submissions on 26<sup>th</sup> August, 2008 through R.A. Owino Deputy Chief State Counsel. In the submissions background information to the petition was given. It was contended that several criminal cases (6 in number) were commenced against the petitioners after investigations. It was contended that the petitioners had sought a mix up of declarations in the same petition. Therefore the petition should not be entertained as there is a mixture of judicial review and constitutional reliefs in the same cause. It was also contended that there was no constitutional issue raised for consideration by this court. Therefore, the items seized should not be released until the determination of the pending criminal cases.

The respondents also filed supplementary submissions on 19<sup>th</sup> September, 2008 through the same Deputy Chief State Counsel.

It was contended herein, inter alia, that the enjoyment of fundamental rights under sections 70 to 83 of the Kenya Constitution are not absolute, but depend on the enjoyment of fundamental rights of others. It was also contended that the court had inherent power to prevent abuse of its process. Reliance was placed on the case of **HARRIKINSON VS-**

A/G of Trinidad & Tobago 1979 3 WLR 62.

It was also contended that the petitioners had failed to disclose material facts therefore the petition should be dismissed. Reliance was placed on the case of **BOOTH IRRIGATION –VS- MOMBASA WATER PRODUCTS HCC MISC. 1052 of 2004.**

It was contended further that the petition does not disclose a cause of action as the petitioners were not specific on the constitutional contraventions alleged. Reliance was placed on cases such as **MATIBA -VS- ATTORNEY- GENERAL HC.** Misc. Application No.666 of 1990, and **ANARITA KARIMI NJERU –VS- R (No.1) 1979 KLR 154.**

On the hearing date Mr. Omwanza for the petitioners addressed me. Mr. Mule for the respondents also addressed me.

The major issue in these proceedings, in my view, is whether evidence obtained without search warrant can be used in a criminal case, without contravening the constitutional provisions of protection of fundamental rights and freedoms. The evidence herein appears to have been obtained by a police search without warrant. The section relied upon is section 76 of the Constitution which provides its relevant part as follows-

- 76(1) *Except with his own consent, no person shall be Subjected to the search of his person or his premises.***
- (2) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-***
  - (a) *that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and county planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit.***
  - (b) *that is reasonably required for the purpose of promoting the rights or freedoms of other persons***
  - (c) .....**
  - (d) .....”**

I have been referred to section 118 of the Criminal Procedure Code (**Cap. 75**) on the powers of a magistrate to order a search, and issue a search warrant. That section in my view, does not state that for all searches the magistrate must give a search warrant. Even if that was the position, where evidence of a crime is detected, it cannot be a defence that that evidence or item of exhibit was obtained either without a search warrant or even accidentally. It is for the person who is charged with the offence to defend himself or herself in court. I do not see the case of **RONALD CHEPKUI –VS- REPUBLIC** and the case of **ANNE NJOGU –vs-REPUBLIC** as saying that such evidence obtained without a search warrant cannot be used in a criminal case. Those two cases were talking about the personal right to freedom of the individual, where there was a specific constitutional provision as to how long a person arrested should remain in custody before being charged.

Section 76 of the Constitution itself provides that a search can be conducted on a person or premises where the

written law permits. The Police Act (**Cap. 84**) section 20(1) provides for instances where a search can be done without warrant. Neither the Constitution, nor the Criminal Procedure Code (**Cap. 75**), nor the Evidence Act 9, (**Cap. 80**) provides that evidence obtained without a search warrant cannot be used in a criminal case in a court of law. What the petitioner wants is to prevent the criminal process, which this court finds no basis for so doing. I will therefore not allow the application.

Consequently, and for the above reasons, I find no merits in the petition and dismiss the same. I decline to grant any of the prayers sought. Any interim orders are hereby lifted.

It is so ordered.

Dated and delivered at Nairobi this 8<sup>th</sup> day of March, 2010.

**George Dulu**  
**Judge.**

**In the presence of-**

Mr. Job Momanyi for the petitioners

David Mutisya Court clerk.