



**Muthike v Divisional Criminal Investigation Officer Industrial Area Police Station & 3 others (Petition E106 of 2024) [2025] KEHC 6424 (KLR) (Constitutional and Human Rights) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6424 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E106 OF 2024**

**LN MUGAMBI, J**

**MAY 22, 2025**

**BETWEEN**

**JANE WANGITHI MUTHIKE ..... PETITIONER**

**AND**

**DIVISIONAL CRIMINAL INVESTIGATION OFFICER INDUSTRIAL AREA  
POLICE STATION ..... 1<sup>ST</sup> RESPONDENT**

**OFFICER COMMANDING STATION INDUSTRIAL AREA POLICE  
STATION ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petition dated 27<sup>th</sup> February 2024 is supported by the petitioner’s affidavit in support of even date.
2. The petitioner in this petition alleges that the respondents herein impounded and have continued to detain her motor vehicle without any just cause, in effect violating her right to property under Article 40 of *the Constitution*.
3. Consequently, the petitioner seeks the following reliefs:
  - a. A declaration that the petitioner’s right to own property under Article 40, of *the Constitution* has been infringed upon.



- b. A permanent injunction restraining the respondents, their servants, agents or any other person acting on their behalf, behest or directions from unlawfully, illegally or arbitrarily taking, keeping and holding the petitioner's Motor Vehicle Registration Number KCC 0X3G.
- c. Damages for unlawful detention of the petitioner's Motor vehicle and damages for non-user.
- d. Costs of the petition.

#### **Petitioner's Case.**

4. The petitioner depones that she is the registered owner of Motor Vehicle Registration number KCC 0X3G. She informs that the vehicle is used in the cargo and transit business both locally and across the neighbouring countries.
5. She alleges that the respondents on 2<sup>nd</sup> August 2023 impounded this vehicle from her home at Kitengela. This was on the allegation that the vehicle had been used to transport stolen maize from Tanzania to Kenya.
6. She informs that at the time when the police officers arrived, the vehicle had been down at her home for 10 days because it had mechanical issues. That as a matter of fact, they found mechanics working on the vehicle.
7. Despite this, the police officers proceeded to impound the vehicle and arrested her but she was later on released on a cash bail.
8. She depones that the vehicle is still being detained at the Industrial Area Police Station and no charges have been preferred against her to date. This despite the petitioner being summoned to the police station on a weekly basis by the 1<sup>st</sup> respondent.
9. The petitioner avers that the continued withholding of the vehicle is prejudicial to her. She avers that the vehicle was purchased using a loan facility from Jamii Bora Bank which she is required to repay. The petitioner is afraid that the vehicle risks being repossessed by the bank as she is unable to generate income to service the loan.
10. The petitioner faults the respondent's continued insistence to detain her vehicle without any charges being preferred against her. She apprehends that the vehicle is exposed to wear and tear and is depreciating in value in hands of the respondent. The petitioner thus asserts that the respondents have violated her right to property as envisaged under Article 40 of *the Constitution*.

#### **Respondents' case.**

11. In response, the respondents filed grounds of opposition dated 9<sup>th</sup> May 2024 on the grounds that:  
SUBPARA i.  
The application and petition are improper, incompetent and an abuse of the court process on the grounds that it offends the provisions of Article 159 of *the Constitution* and the doctrine of exhaustion of remedies. Consequently, there is established, under statute, the Independent Policing and Oversight Authority and the Internal Affairs Unit which are bodies that have been established, mandated and facilitated to handle complaints against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.  
ii. Sections 24 (b), (d), (e), (f) of the *National Police Service Act* mandates the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents with maintaining law and order, protecting life and property, investigating crimes and collecting criminal intelligence and therefore they are well within their statutory mandates



to detain the subject matter as part of investigations related to allegations that it had been used to ferry stolen maize from Tanzania to Kenya.

- iii. Section 26(1) (b) of the *Criminal Procedure Code* authorizes the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to stop, search or detain any aircraft, vessel or vehicle which there is a reason to suspect that it has been used in the commission or facilitation of an offence.
- iv. Granting any of the orders sought in the application and petition would be tantamount to interfering with the powers and authority of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents as provided by *the Constitution* and statute and would disable investigation of crimes.
- v. Article 24 of *the Constitution* allows the state to limit the petitioners' right to property in the face of investigations of theft involving the subject property.
- vi. In accordance with Article 40(3)(b) of *the Constitution* the state is permitted to deprive a person of any property where the deprivation is in the public interest.
- vii. The petitioner is guilty of inordinate delay in lodging the claim. The maxim of delay defeats equity negates any entitlement to reliefs.
- viii. The petitioner is not entitled to the orders sought for the reason that they are untenable in law since a claim for special damages for non-user must be specifically pleaded and proved.

#### **Petitioner's Submissions.**

12. The petitioner filed submissions dated 25<sup>th</sup> November 2024 through Okatch and Partners who highlighted the issue for discussion as:  
whether the petitioner is deserving of the orders sought.
13. Counsel relying in Article 40 of *the Constitution* submitted that every person has a right to acquire and own property in Kenya. This right is also protected under Article 17 of the Universal Declaration of Human Rights and Article 14 of the African Charter on Human and People's Rights. As such Counsel contended that this is fundamental human right.
14. Counsel submitted that the respondents have failed to justify the continued detention of the petitioner's vehicle as no charge had been lodged against her to date. Considering this Counsel submitted that the respondents had infringed the petitioners right to own the property being her vehicle.
15. Counsel further added that although the respondents claim that the vehicle is withheld in view of an investigation, the respondents have not established how long they would continue holding the vehicle before they release it to the petitioner. At the time of filing these submissions it had been more than a year.
16. Counsel argued that the respondents' actions and inordinate delay in handling this matter was clearly in violation of the petitioner's rights under Article 48, 50 and 159(2)(d) of *the Constitution*.
17. In addition, the action has exposed the petitioner to financial losses as well as mental and psychological anguish.



18. Reliance was placed in *Mary Jerubet Kerich & another v Office of the Director of Public Prosecutions & another* [2021] eKLR where it was held that:

“Being a custodian of justice, it is imperative for the court to ensure that should the intended prosecution take place, the evidence required to support it is preserved and will be available to the prosecution during the trial and as such, ordered;

- a. That the 2<sup>nd</sup> respondent takes photographs of the vehicle within the next three days.
- b. That the applicants’ deposit in this court the original logbook of the subject vehicle.
- c. That the respondents to release the subject vehicle to the applicants once they are served with proof of compliance with condition (ii) above.
- d. That the applicants shall avail the subject vehicle to this court or to any other court whenever required to do so.”

19. To this end, Counsel argued that the petitioner was entitled to the orders sought.

### **Respondents’ Submissions.**

20. Principal State Counsel Edna Makori filed submissions dated 19<sup>th</sup> August 2024 and set out the issues for discussion as: whether the petitioner ought to have exhausted existing alternative remedies before approaching court and whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents can lawfully detain the subject matter pending the conclusion of their investigations where the subject matter has been used to commit an offence and whether the state can lawfully detain private property if it is in the public interest to do so.

21. On the first issue, Counsel submitted that the petition had been improperly filed before this Court as the petitioner had failed to exhaust the mechanisms under the *National Police Service Act* before the Internal Affairs Unit and the Independent Policing and Oversight Authority (IPOA) Act before the Independent Policing Oversight Authority. For this reason, Counsel challenged this Court’s jurisdiction to entertain the matter as discussed in *Owners of Motor Vessel ‘Lillian “S” vs Caltex Oil (Kenya) Ltd* [1989] KLR 1.

22. Reliance was placed in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR where it was held that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

23. Like dependence was placed in *Mutanga Tea & Coffee Company Ltd. –vs-Shikara Ltd. & Another* (2015) eKLR and *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR.

24. On the second issue, Counsel submitted that Sections 24 (b), (d), (e), (f) of the *National Police Service Act* mandates the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to investigate crimes and thus were within their statutory



mandate. These respondents are in addition authorized under Section 26(1)(b) of the *Criminal Procedure Code* to search and detain any vehicle which there is a reason to suspect that it has been used in the commission of an offense.

25. Accordingly, Counsel submitted that the orders sought are tantamount to interference with the respondents' mandate. Furthermore, Counsel submitted that Article 24 of *the Constitution* allows limitation of the petitioner's rights to the extent that the limitation is reasonable and justifiable in an open and democratic society.
26. On this basis, Counsel submitted that the petitioner was not entitled to the relief sought as had failed to establish any breach on the respondents' part.

### **Analysis and Determination.**

27. It is my considered view that the issues that arise for determination are as follows:
  - i. Whether the petition invokes the doctrine of exhaustion.
  - ii. Whether the respondents violated the petitioner's constitutional right under Article 40 of *the Constitution*.
  - iii. Whether the petitioner is entitled to the relief sought.

### **Whether the petition invokes the doctrine of exhaustion.**

28. The doctrine of exhaustion of remedies stresses that a dispute which can be resolved by available statutory mechanisms should be resolved as such instead of unnecessarily invoking *the Constitution* as the basis of resolving such a dispute.
29. The Supreme Court in *Waity vs Independent Electoral & Boundaries Commission and Three Others* [2019] KESC 54 (KLR) laid down this principle as follows:

“

“(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

30. Equally, the Supreme Court in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of*



the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] KESC 83 (KLR) stated as follows:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

31. In the present case, the matter raised by the Petitioner is an allegation that her rights have been violated after her property, namely her lorry was arbitrarily impounded on allegations of being used to transport stolen maize from Tanzania on account of carrying investigations into the matter but since 2<sup>nd</sup> August, 2023 no charges have ever been preferred against her and the vehicle remains detained despite the fact that it was bought on loan which she is required to repay.
32. The Respondent argues this matter that ought to have been reported to the Independent Police Oversight Authority (IPOA) so as to be dealt with under the provisions of that Act instead of filing this Constitutional Petition.
33. In a nutshell, the functions of the Independent Policing Oversight Authority are set out under Section 6 of the *Independent Policing Oversight Authority Act* and mainly, the Act relates to investigation of complaints related to disciplinary or criminal offences committed by members of the National Police Service and among the recommendations it can make include prosecution, compensation, internal disciplinary action or any other appropriate relief.
34. This Petitioner’s complaint is not a mere disciplinary complaint against a police officer. She filed the petition to get back her right to property after prolonged delay in finalizing investigations relating to her motor vehicle.
35. I opine that this is a Constitutional matter that falls for determination within the confines of Article 23 (3) as read with Article 165 (3) (b) of the Court hence the jurisdiction of this Court is not ousted by the doctrine of exhaustion of remedies.

**Whether the respondents violated the petitioner’s constitutional right under Article 40 of *the Constitution*.**

36. Article 40(1) and (2) of *the Constitution* provides as follows:
  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.
  2. Parliament shall not enact a law that permits the State or any person—
    - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
    - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).



37. The Court in *Republic v Inspector General of Police Exparte Kennedy Ngeru Irungu* [2016] KEHC 2895 (KLR) observed as follows in a case where the police had impounded the vehicle of the applicant;

“38. For the police to justify the impounding and or detaining of the subject motor vehicle, they must demonstrate that they had received and booked a report of the loss of the said motor vehicle and that they had been making efforts to track it without success from early 2013 to 2015 when they traced it. The police never swore any affidavit to justify their actions. They did not produce in evidence any Occurrence Book report of theft of the subject motor vehicle. The police, in my humble view, are not authorized to impound property and detain it without cause as they did in this case. The police are law enforcement officers and are charged with the duty of maintaining law and order and protection of life and property of all persons. They are not debt collectors and neither are they authorized to attach property but to provide security, where necessary, to enforce court orders or any statutory and enforcement process.

39. ... it is clear in the absence of any affidavit justifying impounding of the subject motor vehicle KAT 165M, I find that the actions by the police at Kiamumbi Police Station are not only illegal, irregular and irrational and without any fairness or at all. It was arbitrary and without justification...There is no absolute authority granted to the police to impound motor vehicles which are not even suspected of being stolen property and whose registered owners go about their ordinary cause of business and detaining them indefinitely. In this case, there is even no evidence that the police were contemplating bringing any criminal charges against the exparte applicant for being in illegal possession of the suit motor vehicle...”

38. Discussing a comparable matter in *Mwau v National Police Service & another* [2023] KEHC 21744 (KLR) the Court observed as follows:

“69. On the issue as to whether the Plaintiff is entitled to the declaration he is seeking, I find that there is undisputed evidence that the plaintiff’s motor vehicle was initially detained for lawful purposes of carrying out investigations after it was shot at by unknown people while being driven by the plaintiff’s driver(pw1).

70. However, there is evidence that the Police continued to arbitrarily detain the motor vehicle and that they refused to release it despite several demands for the release of the same by the plaintiff.

71. I find that there is undisputed evidence that Defendant’s actions of taking away and unlawfully detaining the Plaintiff’s motor vehicle registration No. KAH 268K for over six years and exposing it to the vagaries and elements of weather rendered it unusable to the Plaintiff, which acts of the Defendants are and were unjust, unlawful and done in bad faith...”

39. The Petitioner in the instant case swore that the police went and impounded her vehicle on pretext of carrying out investigations that the vehicle had been used to ferry stolen maize from Tanzania. In their response, there was no information provided concerning the offence which the petitioner was being investigated for. Not even O.B entries were provided to establish the link between the said vehicle and



criminal complaint at the Police Station. In addition, it was not revealed who alleged complainant of the alleged stolen maize was, if any.

40. The reason for such a lengthy detention of the petitioner's vehicle (since 2/8/2023 to date) has not been provided at all.
41. This Court finds that the respondents have failed to establish the existence just cause in impounding and continued detention of the Petitioner's motor vehicle.
42. Although the police are in law justified to seize and detain property to facilitate the conduct of investigations, the power must be exercised reasonably and not be capriciously. This is clear case of abuse of power.
43. Taking away the petitioner's motor vehicle and detaining it for such an inordinate period of time without recommending any charges or offering any plausible explanation for the detention is arbitrary deprivation of property in violation of Article 40 of *the Constitution*.

**Whether the petitioner is entitled to the reliefs sought.**

44. In determining the reliefs the Petitioner is entitled to, I am guided by the Court of Appeal in Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others [2021] KECA 328 (KLR) where the Court held:

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“ 15. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law...”

45. In the instant Petition, I award the following reliefs:
  - a. A declaration that the Respondents have violated the Petitioner's right to own property under Article 40 of *the Constitution*.
  - b. An order of mandamus directed at the Respondents to release the Petitioner's motor vehicle Registration number KCC 0X3G.
  - c. General damages of Kshs.400,000/-.
  - d. Costs of the petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

**L N MUGAMBI**



**JUDGE**

