



REPUBLIC OF KENYA



Chemengich v Director of Criminal Investigations & 2 others (Petition E355 of 2022) [2024] KEHC 5681 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5681 (KLR)

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

PETITION E355 OF 2022

EC MWITA, J

MAY 23, 2024

BETWEEN

MARGARET K. CHEMENGICH PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

**REGIONAL CRIMINAL INVESTIGATIONS OFFICER, NAIROBI
COUNTY 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner purchased motor vehicle registration number KDE 922T, Volkswagen Tiguan from Newton Kimathi Kirimi (Mr. Kirimi) on 29th April 2022 at Kshs. 2,400,000. The petitioner took possession of the vehicle and had it transferred into her name.
2. On 6th June 2022 police officers from Kilimani police station impounded the vehicle while being driven by her daughter. Upon inquiring the reason for impounding the vehicle, the petitioner was informed that Mr. Kirimi had been arrested and charged with the offence of stealing by agent in Criminal Case No. E 598/22 at Kibera Law Courts for failing to remit the purchase price to Wawira Njoka, the owner of the vehicle.
3. It is the petitioner's case that even though the police had promised that they would release the vehicle after the Kirimi had been charged in court, she had been to the police station on several occasions to collect the vehicle but the police declined to release it. The vehicle was only released on 19th July 2022 after the court issued an order for release of the vehicle pending determination of the petition.
4. The petitioner asserted that there is no denial that she purchased the vehicle and had it transferred into her name. There is also no challenge to her title to the vehicle. According to the petitioner, the charge



facing Mr. Kirimi as sales agent, is theft by agent for failure to remit the purchase price for the vehicle to the owner. There is no claim that Mr. Kirimi had no authority to sell the vehicle. No plausible reason had been given why the vehicle was repossessed even if it was to be an exhibit in the criminal trial.

5. The petitioner argued that, as public officers, police officers were bound to respond to her advocates' letter of inquiry dated 1st July 2022 in accordance with sections 4 and 6 of the *Fair Administrative Action Act*, 2015. The petition further argued that the respondents' grounds of opposition do not adequately respond the petition and the law. Neither do they show why and how the petition is vexatious and or an abuse of the court process.
6. The petitioner asserted that she had proved violation of her fundamental rights and prayed for an award of general damages of Kshs. 5,000,000.
7. To support of her case, the petitioner relied on the article 40(3) of *the Constitution* and decisions in Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR; Attorney General v Zinj Limited (2021) KESC 23(KLR); Anarita Karimi Njeru v Republic (No. 1) (1979) KLR 15; Kenya Commercial Exchange Service Bureau Limited v Central Bank of Kenya (2022) KEHC 13189 (KLR); Muchanga Investments Limited and Safaris Unlimited (Africa) Limited and 2 others (2009) eKLR; and Dawkins v Price Edward of Saxe Weimar (1976) 1 QBD 494.
8. The petitioner sought the following reliefs:
 - a. A declaration that the 1st and 2nd respondents being the persons in charge of investigating crime and having arrogated themselves the duty of deciding to preserve the petitioner's motor vehicle and having not shown any reason or right to detain the said motor vehicle, have illegally and without shade of right deprived the petitioner of the ownership, possession and use of her property and are thus in violation of article 40 of *the Constitution* of Kenya.
 - b. A declaration that the 1st and 2nd respondents have failed to give any reasons or any plausible reasons why there should be a continued detention of the petitioner's property and are thus in violation of article 47 of *the Constitution* of Kenya.
 - c. Damages for wrongful detention of the petitioner's property.
 - d. Cost of the petition be provided.
 - e. Further or any other relief that the Honourable Court may deem fit to grant.

Response

9. The respondents opposed the petition through grounds of opposition and written submissions. According to the respondents, the petition lacks clarity, precision and does not disclose a cause of action against the 1st and 3rd respondents. The orders sought against the 1st and 3rd respondents are also not tenable since police officers were merely carrying out their duties as prescribed by law.
10. The respondents contended that the vehicle was impounded in line with the functions and duties of the police under section 107 of the *Traffic Act* (Cap 403 Laws of Kenya). The vehicle was held at the police station in connection to a criminal case pending in court.
11. The respondents argued that fundamental rights and freedoms are subject to respect for the rights and freedoms of others and for public interest as provided for by Article 24(1) (d) of *the Constitution*. It is the respondents' position, therefore, that the petitioner has not proved that her rights and fundamental freedoms were violated.



12. The respondents relied on sections 107 and 109 of the *Evidence Act* on the burden of proof. They also relied on the decisions in Lt. Col. Peter Ngari Kaguma & others v Attorney General (Constitutional Petition No. 128 of 2006) and Ameyna Wafula & others v Republic (Nairobi HCC No. 343 of 2000);
13. Regarding damages and quantum, the respondents contended that an award of damages of Kshs. 5,000,000 is exaggerated since there is no proof that the vehicle depreciated to warrant the award of such mount. The respondents urged that the petition be dismissed.

Determination

I have considered the petition, the response and arguments by parties. The issues for determination are whether the petitioner's rights to property were violated and whether she is entitled to damages

violation of rights

14. The facts in this petition are not in dispute. The petitioner purchased the vehicle from a yard and was served by Mr. Kirimi. She paid the agreed purchase price, took the vehicle and had it transferred into her name, thus became not only the registered owner but also took possession.
15. The vehicle was repossessed by police officers and the explanation given was that there was a criminal case at Kibera Law Courts where a criminal charge had been laid against Mr. Kirimi. The vehicle was, therefore, to be an exhibit in that case.
16. It has been stated that Mr. Kirimi is being prosecuted for failing to pass the purchase price for the vehicle to the owner. There is no allegation that the petitioner stole the vehicle in conjunction with Mr. Kirimi. The petitioner is not even charged together with Mr. Kirimi for the offence he is facing.
17. Section 8 of the *Traffic Act* provides 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." The petitioner having paid for the vehicle and had it registered into her name as required by law, she became the owner of thereof. The respondents have not denied that the petitioner is the owner of the vehicle. They have not alleged that the purchase of the vehicle and its subsequent registration into the petitioner's name is under any challenge. The only alleged concern of the police is that Mr. Kirimi did not pass the purchase price for the vehicle, which has nothing to do with the petitioner.
18. The vehicle was repossessed while being used by the petitioner's daughter, taken to the police station and detained. The repossession and detention of the vehicle violated the petitioner's right to use the vehicle as her property.
19. Article 40(3) of *the Constitution* prohibits the state from depriving a person of his property of any description, or of any interest in the property, right over the property unless the deprivation meets the exceptions in that article.
20. Article 40(6) is an exemption to protection of property under article 40 rights in that the rights under article 40 do not extend to any property that has been found to have been unlawfully acquired. The respondents have not argued, and it is not their case, that the petitioner unlawfully acquired the vehicle. Indeed, the nature of the criminal charge laid against Mr. Kirimi shows that the petitioner is not to blame in any way. That is, there is no allegation that the vehicle was unlawfully acquired.
21. That being the case, this court finds and holds that the action by the police to repossess and later detain the vehicle was egregious and violated the petitioner's right to property guaranteed under Article 40 of *the Constitution*. The repossession and subsequent detention of the vehicle was not sanctioned by law and the respondents have not shown that they acted as they did pursuant to any law.



22. The respondent attempted to rely on sections 106 and 107 of the *Traffic Act* to justify their action. A reading of the two provisions renders no help to the respondents' case. The two sections cannot, even on the stretch of imagination, assist the respondents. This is because section 106 gives instances when a vehicle can be removed from a public road.
23. The circumstances include: where a vehicle is found in use on a road in contravention of the provisions of the Act; where a vehicle has been left on a road or other public place in such circumstances as to make it appear that such vehicle has been abandoned or should be removed to a place of safety; where a vehicle has been left on a road in a position which causes or is likely to cause danger to other road users and the owner or driver cannot readily be found.
24. Section 106(3) protects a police officer who has ordered removal of a vehicle from the road under section 106 (2) from being held liable for any damage to or loss of any item from such vehicle during its removal to or detention at a police station or other place of safety.
25. Section 107, on the other hand, makes it lawful for a police officer to detain a vehicle which has been removed from a road or other public place under section 106 at a police station or other place of safety until such inquiries have been made by the police as they may think necessary in the circumstances of the case. This section offers protection to a police officer who acts within the limit of the power conferred on him by the law. He must also act in good faith in exercising that power.
26. The respondents did not show that the vehicle was removed from the road under any of the circumstances permitted under section 106 (1), and detained at the police station to make it lawful under section 107. The vehicle was ostensibly repossessed because there was a criminal case in which the vehicle would probably be an exhibit. That is not one of the grounds permitted by sections 106 and 107 for purposes of repossessing the vehicle and detaining it at the police station.
27. I find and hold that the police action of repossessing the vehicle and later detaining was in violation of the petitioner's right to property.

Whether damages should be awarded

28. The petitioner sought general damages for the wrongful detention of the vehicle. The petitioner's contention was that the police deprived her ownership and use of the vehicle as her property. She stated that the police had also unfairly treated her contrary to article 47 of *the Constitution*.
29. This court has found that the vehicle was repossessed while being used by the petitioner's daughter and detained at the police station. This action was egregious and violated the petitioner's right to use the vehicle.
30. Upon proof of violation of a fundamental right under article 23 (3)(e), one of the reliefs the court may grant is to order compensation. In this respect, the Supreme Court stated in *Attorney General v Zinj Limited (supra)*:

(29) It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts. Under Article 22 (1) of *the Constitution*, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed,



or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation. The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.

31. It is not always the case that violation of the right to property will automatically attract compensation by way of general damages. Depending on the nature of the violation, loss and the extent suffered, the court may award special damages. A petitioner must therefore show the loss and the extent of the loss suffered from that violation. That is, a petitioner has to prove that he suffered loss that would call for compensation.
32. In this petition, the petitioner's vehicle was repossessed and detained at a police station. In that regard, the damage to be ordered if any, would in my view, be compensatory which is in the nature of special damages. That is, compensation to the extent the petitioner suffered as a result of the repossession and detention of the vehicle for the period the vehicle was under detention.
33. In case of special damages, a party must not only specifically plead, he must also strictly prove the damage suffered. This is because special damages are the precise amount of pecuniary loss the party should prove to have flowed from the particular set of facts complained of in the pleadings.
34. These damages are intended to restore the party to the financial position he would have been, had the violation not occurred. (See *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR and *Provincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa*, (KSM Civil Appeal No 179 of 1995).
35. In *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, (SCCA 109/2002); JM 2004 CA 40; [2004] 12 JJC 2015, Cooke, J.A. delivering the judgment of the Court, stated that special damages must be strictly proved; the court should be very wary to relax this principle; what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.
36. In *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC. delivering judgment of the Supreme Court of Nigeria, stated:

I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

37. I have gone through the petition, supporting affidavit as well as written submissions. The petitioner did not plead the loss suffered as a result of the repossession and detention of the vehicle. For instance, the petitioner did not plead and did not adduce evidence on what the vehicle was being used for, how the repossession and detention negatively affected her and how much the loss, if any, was for the period the vehicle was under detention to enable the court determine whether the damages were recoverable. In the circumstances, the petitioner has not satisfied the requirements for an award of damages.



Conclusion

38. Having considered the petition, the responses, submissions and the decisions relied on, the conclusion I come to, is that the police had no lawful reason for repossessing and detaining the petitioner's vehicle. The petitioner having purchased the vehicle; paid for it and had it transferred to her name, she became the lawful owner of the vehicle unless there was contrary evidence. The repossession and detention of the vehicle was a violation of the petitioner's right to property.
39. That notwithstanding, the petitioner did not plead and has not proved that she suffered loss and the extent of the loss. She did not therefore prove the claim for damages

Disposition

- 40 The appropriate reliefs that commend themselves for granting, and which the court hereby grants, are as follows:
1. A declaration is hereby issued that motor vehicle registration No. KDE 922T Volkswagen Tiguan Chassis No. WVGZZZ5NZFW013855, Engine No.CTH-173128, belongs to Margaret K. Chemengich.
 2. An order is hereby issued directing the Officer Commanding Station, Kilimani Police Station, to immediately release, (if not already released), motor vehicle registration No. KDE 922T Volkswagen Tiguan Chassis No. WVGZZZ5NZFW013855, Engine No.CTH-173128 to Margaret K. Chemengich.
 3. Costs to the petitioner to be borne by the 3rd respondent- the Attorney general.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2024

E C MWITA

JUDGE

