



**Mugo v Attorney General & 2 others (Petition E010 of 2022)
[2024] KEHC 8062 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PETITION E010 OF 2022**

MA ODERO, J

JULY 4, 2024

BETWEEN

JAMES MAINA MUGO PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

MAJOR GEORGE MURIITHI MUTHEE 3RD RESPONDENT

JUDGMENT

1. Before this court is the Petition dated 16th November, 2022 by which the petitioner James Maina Mugo seeks the following orders:-
 - a. A declaration be issued that the actions of the 2nd and 3rd Respondents as averred are unconstitutional and infringe on the Petitioner's rights and freedom being: Right to equal protection and equal benefit of the law. Right to protection of right to property. Freedom from discrimination.
 - b. Damages for breach of the petitioner's constitutional rights and freedoms.
 - c. An injunction directed to the 2nd and 3rd Respondents to return the motor vehicle to the Petitioner, in default whereof the said Respondents do compensate the petitioner with the value of the motor vehicle at an estimate of Kshs. 700,000/=
 - d. An Order that the Respondents do compensate the petitioner for loss of user of the motor vehicle at the rate of Kshs. 3,000 per day from 28th January, 2022 to the date of return of the motor vehicle or compensation for the value thereof as prayed in (c) above.



- e. Damages for the tortious acts of defamation, misfeasance in Public Office and conversion of property.
 - (f) Costs and interest.”
2. The petition was premised upon Articles 2(1), 3, 10, 20, 21, 22, 23,27, 40, 50 and 159 of *the Constitution* of Kenya 2010 and was supported by the Affidavit of even date and the Further Affidavit dated 29th March, 2023 both sworn by the Petitioner. The 1st Respondent the Hon. Attorney – General opposed the Petition through the Replying Affidavit dated 17th February, 2023, sworn by Erickson Nyamwega a police officer attached to Kieni East Sub-County DCI Office.
 3. The 3rd Respondent George Muriithi Muthee filed a Replying Affidavit dated 18th January, 2023 whilst the Auctioneer Peter Muchume Gachie an Auctioneer practicing under the name and style of Regent Auctioneer (n) Limited filed a Replying Affidavit dated 27th March, 2023.
 4. The matter was canvassed by way of written submissions. The Petitioner filed the written submissions dated 18th March, 2024 whilst the 1st and 2nd Respondents relied upon their written submissions dated 22nd March, 2024.

Background

5. The Petitioner avers that on or about 18th August, 2014 he lawfully purchased a Motor vehicle Registration Number KCH 743 B Toyota Station Wagon DX (herein after referred to as ‘the motor vehicle’) following an auction conducted by Regent Auctioneers upon instructions from the National Police Service.
- (6) That following the auction and payment of the requisite purchase price the petitioner was on 31st May, 2016 issued with the log book for the vehicle and took possession of the said motor vehicle.
- (7) The Petitioner states that on or about 28th January 2022 at about 8.00pm, he was driving the said motor vehicle along the Nyeri-Nyahururu Highway when he noticed, that another vehicle was suspiciously following him. The Petitioner being apprehensive drove into Naro Moru Police Station and the vehicle which had been trailing him also drove into the police.
- (8) Inside the police station, the five (5) occupants of the second vehicle alighted and claimed that they had been pursuing the Petitioner because they believed that the vehicle which the Petitioner was driving had been stolen from the 3rd Respondent Major George Muriithi Muthee.
- (9) The 3rd Respondent narrated sometime in the year 2010 that, he had purchased a motor vehicle Registration Number KAW 366J from one Caleb Opiyo Odhiambo.
10. That on 27th October, 2013 the 3rd Respondent parked his motor vehicle at Kibirichia Market in Meru County. Upon returning he found the vehicle missing and reported the theft at Kiirwa Police Station, Githongo Police Station and Timau Police Station.
However despite efforts by the police the vehicle was never traced.
11. On 28th January 2022, nine (9) years after the theft of his vehicle the 3rd Respondent was driving to Meru when near Brookside - Chaka he noticed a car which looked similar to his stolen vehicle but which vehicle bore Registration Number KCH 743B. The 3rd Respondent attempted to flag down the vehicle but the driver sped off towards Naro Moru Police Station.
12. At the police station after hearing the parties police seized the Petitioners Motor vehicle pending investigations. On 29th January, 2022 the Petitioner went to the police station and presented his



ownership documents for the vehicle. However the police concluded that the vehicle belonged to the 3rd Respondent and on 31st January, 2022 released the motor vehicle to the 3rd Respondent.

13. The Petitioner was ordered to report regularly at the police station until 25th March, 2022 when he was informed that investigations into the matter had been closed. The Petitioner requested that his vehicle be released back to him but this was not done.
14. The Petitioner contends that the actions of the Respondents amounted to a denial of his constitutional rights to ownership and use of his motor vehicle. That as a result of denial of his vehicle he was forced to hire alternative transport at the rate of Kshs. 3,000/= per day. The petitioner also claims for a reimbursement of the value of his motor vehicle being Kshs. 700,000. The Petitioner alleged that the Respondents violated, breached and infringed his constitutional rights and freedoms in the following manner;-
 - i. The seizure of the motor vehicle was unlawful in the circumstances the motor vehicle having been legally acquired from the same 2nd Respondent who had sold the same to the Petitioner as averred.
 - ii. The seizure of the motor vehicle was unlawfully seized for lacking any factual or legal basis.
 - iii. The seizure of the motor vehicle was apparently done with improper and ulterior motives of unjustly enriching the 3rd Respondent, while denying the Petitioner his property.
 - iv. The seizure of the motor vehicle was maliciously done as the 2nd Respondent was aware of the Petitioner's ownership thereof having sold the same to him.
 - v. The seizure of the motor vehicle and disposal thereof to the 3rd Respondent denied the Petitioner the right of possessing enjoying and owing the motor vehicle, thus infringing on the Petitioner's right to protection of right to property.
 - vi. The act of the 3rd Respondent of using police powers to unlawfully obtain the motor vehicle, and the 2nd Respondent allowing itself to be so used infringed on the Petitioner's right to equal benefit and protection of the law.
 - vii. The acts of the 2nd Respondent of citing the Petitioner for a criminal offence and subjecting him to the criminal process were in breach of the duty to respect, protect, promote and fulfill the Petitioner's rights and freedoms by the 2nd Respondent.
15. On their part the police represented by the 1st Respondent avers that he was instructed by his OCS Keller Makau to conduct investigations in order to establish the genuine owner of the motor vehicle in question. He noted that the chassis number of the vehicle had been tampered with. That however before concluding investigations he was instructed by the OCS to release the vehicle to the 3rd Respondent.

Analysis And Determination

16. I have carefully considered this petition, the replies filed thereto as well as the written submissions filed by the parties. The first question is whether the petition as framed meets the threshold of a constitutional Petition.
17. The courts jurisdiction on constitutional Petitions is pegged upon Article 165 (3) (b) as read together with Articles 22(3) and 3(b) and 23 of the constitution of Kenya 2010 which govern the power, process, procedure and remedies for a person seeking to enforce the Bill of Rights.



18. In the case of *Anarita Karimi Njeru v Republic* [1979] eKLR the court stated this;-
- “We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed”
19. The crux of the Petitioners complaint is the question of ownership of the motor vehicle Registration KCH 743 B. The Petitioner insists that the vehicle belongs to him whilst the 3rd Respondents asserts that this is the same vehicle which was stolen from him way back in the year 2010.
20. The Petitioner alleges that the Respondents violated and infringed his rights by unlawfully seizing his motor vehicle. That the actions of the 2nd Respondent denied him his right to equal protection and equal benefit of the law as well as his right to own property and amounted to discrimination against the petitioner.
21. The National Police Service is created under Article 243 of the Constitution of Kenya 2010. Section 26 (1) (c) of the Criminal Procedure Code gives the Police power to detain and search aircraft,vessels, vehicles and persons. It provides as follows:-
- “26 (1) (c) a police officer or other person authorized in writing in that behalf by the Commissioner of Police may stop search and detain any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.
22. Further section 26 (2) of the Criminal procedure Code provides as follows:-
- No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention under this section of an aircraft, vessel or vehicle.
23. Therefore the seizure of the motor vehicle done was in accordance with the power bestowed to the 2nd Respondent for it to conduct investigations.
24. In *Kipoki Oreu Tasur v Inspector General of Police & 5 others* [2014] eKLR held as follows:-
- “.....The Criminal Justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.”
25. Accordingly I opine that in seizing the vehicle pending investigations the police were merely carrying out their mandate as provided for in law.
- As such the police cannot be said to have acted unlawfully.
26. As stated earlier the substratum of this Petition is the Petitioners claim to ownership of the motor vehicle. The Petitioner insists that he legitimately acquired the said motor vehicle through a sale by auction.



Following police investigations the Petitioner was charged with the offence of Being in Possession of a stolen Motor vehicle contrary to Section 324 of the Penal Code. This court has not been told of the outcome of that case.

27. It is further revealed that there were two different opinions regarding the vehicle. The Investigating officer opined that the chassis number of the motor vehicle had been interfered with whilst the Forensic Expert held the view that the Chassis number had not been interfered with.
28. There are not issues which this court can comment and/or decide on.
There are issues which can only be determined under the ambit of a criminal trial.
29. The petitioner also seeks orders of reimbursement for the vehicle at Kshs. 700,000 and he also prays that the Respondents be ordered to reimburse him for the costs incurred in hiring alternative transport at the rate of Kshs. 3,000/= per day.
30. Once again there are not issues to be determined under a constitutional petition. These are Civil Claims which the Petitioner ought to pursue by filing a civil suit against the Respondents.
31. The petitioners allegation that he has been subjected to discrimination has also not been proved.
32. In Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR the court stated on proof of discrimination as follows:-

“.....unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of *the Constitution* should be determined by applying a three-stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of *the constitution*. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of *the constitution*.” [own emphasis]

33. There is nothing to show that the actions of the police in detaining the vehicle and investigating the matter were unreasonable and /or arbitrary. The police were acting on complaints (report) made by the 3rd Respondent Based on the above I find that this petition does not meet the threshold for a constitutional petition. The same is hereby dismissed in its entirety. Costs will be met by the Petitioner.

Dated in Nyeri this 4th day of July, 2024.

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MAUREEN A. ODERO

JUDGE

