



REPUBLIC OF KENYA



KENYA LAW
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**Ntongai v Kaberia & 3 others (Constitutional Petition 3 of 2019)
[2023] KEHC 508 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION 3 OF 2019
TW CHERERE, J
FEBRUARY 2, 2023
IN THE MATTER OF: ARTICLES 2, 19, 20, 22(1) & (2), 23,
25, 159(2) (A)& (B), 258 AND 260 OF
CONSTITUTION OF KENYA, 2010 FOR
ENFORCEMENT OF RIGHTS AND
FREEDOMS
AND
IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER
ARTICLES 27, 28, 29 (C) AND (F) AND 40 OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: COUNTY GOVERNMENT ACT 2012 NO.
17 OF 2012
AND
IN THE MATTER OF: THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS, PRACTISE
AND PROCEDURES RULES 2013
BETWEEN
MOSES NTONGAI PETITIONER
AND**



BENJAMIN KOBIA KABERIA	1 ST RESPONDENT
HENRY KIRRINYA	2 ND RESPONDENT
INNOCENT NTONGAI	3 RD RESPONDENT
COUNTY GOVERNMENT OF MERU	4 TH RESPONDENT

JUDGMENT

Petitioner's case

1. Moses Ntongai (Petitioner) has brought the present petition to claim damages among other reliefs arising out of events that occurred on January 2, 2019.
2. It is the Petitioner's case that on the material date, he parked his motor vehicle KCR 887H and without paying parking fees went into a supermarket and upon return found it clamped. Petitioner pleads that upon inquiring from the 1st to 3rd Respondents, who are employees of the 4th Respondent why his motor vehicle had been clamped, they assaulted, insulted, humiliated and mishandled him and caused him bodily injuries.
3. He also accuses the Respondents for detaining his motor vehicle and requiring him to pay KES 15,550/-, which he paid and his motor vehicle was released to him. He faults the 4th Respondent for failing to display clear signs and notices for purposes of directing motorists on the matter of parking fees and the mode of payment of the same.
4. Arising from the foregoing, Petitioner prays for the following reliefs:
 1. A declaration that the 1st to 3rd Respondents have violated the Petitioner's rights to human dignity under Article 28 of Constitution and the right not to be subjected to any form of violence or be treated in a cruel, inhuman or degrading manner under Articles 29 (c) and (f) of the Constitution
 2. A declaration that failure by the 4th Respondent to display on all strategic parking spaces and or publish and publicize information regarding parking payment policy within Meru Township is a violation of Petitioner's right to information as guaranteed under Article 35 (1) and (3) of the Constitution
 3. A declaration that the act of clamping and impounding the Petitioner's motor vehicle and requiring him to pay KES 15,500/- prior to its release was a violation of the Petitioner's right to property as it amounted to arbitral deprivation of his property and the interests and rights over the said motor vehicle
 4. An order of judicial review in the nature of mandamus compelling the 4th Respondent to display clear and visible signs, notices, signal or other devices erected or in any way displayed for the purposes of directing motorists on matters of parking fees and the mode of payment of the same
 5. An order of exemplary and punitive damages be issued against the 1st to 4th Respondents jointly and severally on account of their gross violation of the Petitioner's fundamental freedoms and rights
 6. Costs the Petition



7. Any other relief

Respondents' case

5. Respondents' Case is contained in an affidavit sworn on April 18, 2019 by Patrick Mugambi, the 4th Respondents Ag. Director, Revenue Enforcement. He avers that Petitioner failed to pay parking fees and when he found his motor vehicle clamped damaged the clamp by cutting it with a hacksaw. He concedes that Petitioner was by law required to pay KES 15,500/- for declamping and denies that 4th Respondent is liable for any violence that may have been meted out on the Petitioner.

Analysis and Determination

6. I have considered the affidavits on record and annexures thereto, the written submissions and authorities filed on behalf of the parties and the issue for determination is whether or not there is a competent constitutional petition before the Court that satisfies the threshold enunciated in the celebrated case of *Anarita Karimi Njeru vs The Republic* (1979) eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The principle established in the Anarita Karimi Njeru case (*supra*) was that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The Mumo Matemo case (*supra*) reaffirmed the principle in the Anarita Karimi case when the Court at paragraph 44 of the judgment stated as follows: -

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (*supra*). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent".

7. Further at paragraph 87(3) in the same judgment the Court on its findings stated as follows: -

"It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the *constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."

8. From the foregoing, it is trite that it is enough for a Petitioner to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the Respondents to be able to respond to and/or answer to the allegations or complaints.
9. In the petition Petitioner's complaints arise from clamping of his vehicle and assault on his person. Concerning parking fees, Petitioner readily concedes that he knew and was aware that he was required to pay his vehicle's parking fees.



10. In the case of *Ernest CO Muga v Attorney General* [2018] eKLR, the Court of Appeal in dealing with matters that ought to be filed in the Constitutional Court stated as follows:

This Court has consistently and variously stated that the Constitutional Court should not be misused for the determination of ordinary civil and legislative disputes that are made to masquerade as Constitutional litigation, seeking to enforce fundamental rights. In upholding this position, in the case of *Royal Media Services Limited vs The Attorney General* Civil Appeal No 45 of 2012, this Court stated;

“...In our view the judge cannot be faulted for holding that a constitutional petition procedure adopted by the appellant in ventilating its claim was ill suited for the kind of claim it had laid before the trial court namely debt collection. We had occasion in the past to bemoan the current trend of filing constitutional petitions and references on matters or claims that have no iota or scintilla of any constitutional bearing. This trend of constitutionalizing virtually everything, which is actually, in our view an abuse of the court process, needs to be nibbed in the bud and frowned upon. We stated thus in the case of *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another* [2016] eKLR.

11. In the case of *Patrick Mbau Karanja vs Kenyatta University* (2012) eKLR Lenaola, J (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked:-

“I should only say this as I conclude; in *Francis Waithaka vs Kenyatta University* Petition No 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang vs Ariong* (1987) LRC (const.) 517 where it was held as follows:-

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws” The rights and duties of individuals, and between individual, are regulated by private laws. The *Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the *Constitution* under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the *Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

12. The learned judge in the foregoing case also stated as follows: -

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.



13. In the case of *Bernard Murage vs Fine Serve Africa Ltd & others* (2015) eKLR the Court stated:-

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

14. Concerning alternative remedy *in lieu* of constitutional remedies, Chacha J *Godfrey Paul Okutoyi & others vs Habil Olaka & Another* (2018) eKLR stated: -

Paragraph 65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

15. And in Mutungi J’s in *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR expressed himself on the same issue as follows:

I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court. (See also the case of *Abraham Kaisha Kanziku vs Governor of Central Bank & others* (2006) eKLR.)

16. I fully associate myself with the sentiments of the learned justices in the above referenced cases and I agree that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights.

17. In the present matter, there is no evidence that Petitioner reported the alleged assault to police nor filed a civil claim for damages now sought in this Petition.

18. Concerning the alleged assault meted against the Petitioner and the detention of his motor vehicle, I find that there exist alternative remedies of filing a civil suit or a complainant with the police and Petitioner ought not to have invoked the jurisdiction of the Constitutional Court.

19. However, a case has been made out that warrants an order compelling the 4th Respondent to provide information concerning its parking policy.

20. Consequently, the Petition succeeds only on one limb and it is hereby ordered that:

1. An order of judicial review in the nature of mandamus is hereby issued compelling the 4th Respondent to display clear and visible signs, notices, signal or other devices erected or in any way displayed for the purposes of directing motorists on matters of parking fees and the mode of payment of the same
2. Each party shall bear its own costs

DELIVERED THIS 02ND DAY OF FEBRUARY 2023



WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

For Petitioner - Mr Mwiti for Mutuma Gichuru & Associates

For Respondents - Mr. Mutuma for Mutuma & Koskei Advocates

