



**Mwangi v Mwangi & 4 others (Constitutional Petition E032 of 2021)
[2023] KEHC 1878 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E032 OF 2021**

MM KASANGO, J

MARCH 17, 2023

**IN THE MATTER OF ARTICLES 20, 22, 23, 35(1)(A), (B), 40(1),
159, 161 AND 169 OF THE CONSTITUTION OF KENYA**

BETWEEN

FLORA WAMBUI MWANGI PETITIONER

AND

COLLINS ODHIAMBO MWANGI 1ST RESPONDENT

SENIOR PRINCIPAL MAGISTRATES' COURT KIKUYU 2ND RESPONDENT

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

CHIEF COMMANDING POLICE STATION KIKUYU 4TH RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY 5TH RESPONDENT

JUDGMENT

1. The background of this petition is the dispute of who is the rightful owner of motor vehicle registration number KCE 716 A.
2. The petitioner, Flora Wambui Mwangi, deponed she purchased the subject motor vehicle and, in this regard, annexed a copy of the log book which reveals that she was registered as owner of that vehicle on July 31, 2015. She deponed that she decided to sell the subject vehicle in August 2017 to Dennis Gitobu (Dennis). That sale was evidenced by an agreement dated August 29, 2017 signed by the petitioner and Dennis. Dennis deposited into the petitioner's Equity bank account a cheque of Kshs 652,500, being the purchase price. The petitioner deponed that on August 28, 2017 she released the motor vehicle and the log book to Dennis when the afore-stated cheque was reflected as cleared in her bank account. On August 31, 2017 the petitioner was informed by her banker that the credited amount of the aforesated Cheque had been reversed the previous day because the account from which the



cheque was written had been frozen. Petitioner stated she was thereafter unable to reach Dennis on his telephone number. The petitioner reported the matter at Kikuyu police station. She additionally wrote a letter dated October 16, 2017 placing a caveat on further registrations or transfer on the subject vehicle pending investigation and resolution of the subject vehicle.

3. Petitioner deponed that the 1st respondent Collins Odhiambo Okello (Collins) was arrested in June 2018 while in possession of the subject vehicle. Collins was charged with the offence of theft and in the alternative the offence of handling stolen goods.
4. Petitioner stated that she and her husband testified at Collins' criminal trial but that the prosecuting counsel of the Director of Public Prosecution (DPP) closed the prosecution's case without calling the investigating officer (I.O) or the Forensic Document Examiner. The petitioner's contention is that the DPP made no effort to summon those remaining witnesses to testify at Collin's trial.
5. As the title of this petition reveals the petitioner has brought this case against five respondents. The petitioner seeks the following prayers:-
 - a. A Declaration that the Petitioner's rights to property under Article 40 of the Constitution have been violated or are threatened to be violated by the 1st, 2nd, 3rd and 5th Respondent's action and inactions.
 - b. A Declaration that the Petitioner's Right to Justice under Article 159 of the Constitution have been violated by the 2nd, 3rd and 4th the Respondents; inaction or inability to ensure that the state witness attended Court and further testified in Kikuyu Chief Magistrates' Court Criminal Case No. 798 Of 2018 Republic Versus Collins Odhiambo Okello.
 - c. A Declaration that the Petitioner is the Legal Rightful and Lawful owner of the suit Motor Vehicle KCE 716 A, Toyota Porte.
 - d. An order compelling the 2nd, 3rd, 4th and 5th Respondents to release the suit Motor Vehicle KCE 716A, Toyota Porte to the Petitioner as the Legal, Rightful and Lawful owner.
 - e. An Order of Permanent Injunction restraining the 1st, 4th and 5th Respondent, its servants, employees, agents or otherwise howsoever from transferring, charging, conveying, delaying or otherwise interfering in any manner with the Motor Vehicle KCE 716A and its parts, of the suit Motor Vehicle.
 - f. An Order of Mandatory Injunction compelling the 5th Respondent to produce for the inspection of the court and the Petitioner the original records and documents in relation to Motor Vehicle KCE 716 A, the suit Motor Vehicle.
 - g. An Order of Mandatory Injunction compelling the 5th Respondent to rectify any of its records and documents that may have already been fraudulently tampered with to reflect to the satisfaction of the court and the Petitioner the true and actual position with regards to Motor Vehicle Registration Number KCE 716 A.
 - h. An Order compelling the 3rd Respondent to initiate Investigations in line with the Petitioner's complaint and conduct as against its officers and file in court its respective report and recommendation within such time that the court may deem fit.



- i. An Order compelling the 5th Respondent to initiate Investigations in line with the Petitioner's complaint and conduct as against its officers and file in court its respective report and recommendation within such time that the court may deem fit.

Analysis

6. Taking into consideration the above prayers the petitioner's main claim seems to be a claim to enforce legal right over the subject motor vehicle. The subject motor vehicle is presently held at the Kikuyu police station. This was after the Criminal Court found that Collins had no case to answer when a verdict of not guilty was entered and he was acquitted of the criminal charges of stealing the motor vehicle and alternative charge of handling stolen goods under section 210 of the criminal procedure code.
7. The petitioner's case in this petition, is that DPP failed to call the Investigative Officer to adduce forensic evidence during the trial of Collins and thereby contravened the petitioner's constitutional right to justice.
8. Further it is the petitioner's case that despite having placed a caveat with the 5th respondent, the National Transport and Safety Authority (NTSA) the said NTSA transferred the subject motor vehicle into the name of Collins and thereby violated the petitioner's constitutional rights to property.
9. In my view having reviewed the affidavit evidence of the petitioner and Collins, I find and hold that this matter raises issues that are purely civil in nature and not constitutional violation.
10. This brings to mind the holding in the case of *John Harun Mwau -v- Peter Gastrow And 3 Others* (2014) eKLR as follows:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...

It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

11. It is also worth considering the case of *Uhuru Muigai Kenyatta v Nairobi Star Publication Limited* (2013) eKLR where Justice Lenaola (as he then was) stated:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (*supra*) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG Vs S.k. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

12. The petitioner has in my view made what is not a constitutional issue into one. This issue herein can be resolved by the petitioner filing a claim to establish her ownership of the subject motor vehicle under civil procedure. This court sitting as a Constitutional Court cannot determine to whom the subject motor vehicle belongs to. That determination requires the court receiving evidence in chief and in cross-examination for such determination. This is much more so because Collins in his replying



affidavit deponed that the subject vehicle was sold to him by someone posing as the petitioner and he was only surprised to note that the person who sold the vehicle to him was an imposter when the petitioner gave evidence during his criminal trial, that is, when he realized that person who sold the vehicle to him was not the petitioner. Collins however contends he rightly and legally purchased the subject vehicle which vehicle was registered by NTSA in his name.

13. Moreover, on whether DPP violated the petitioner's constitutional right in failing to call the Investigative Officer and Forensic evidence, I find that the petitioner failed to provide evidence of such violation. It ought to be stated that DPP does not require the consent of any person or authority in exercise of his prosecutorial powers save that he ought to always have regard of the public interests in exercise of his powers. I have perused the evidence tendered by the petitioner during the criminal trial of Collins. The petitioner was categorical that she sold the subject vehicle to Dennis Gitobu. She stated that she did not deal with Collins. Indeed, the petitioner's husband, the second witness at that trial repeated the same evidence that Collins was not involved in the transaction when the petitioner's vehicle was taken by Dennis Gitobu. I have also perused the Investigative Officer's written statement. That statement does not at all implicate Collins in the theft of the subject vehicle. The Forensic evidence confirms that the alleged signature of the seller in the sale agreement, which Collins provided as proof of his purchase of the subject vehicle, was not the petitioner's signature. In my view the calling of the Investigative Officer or the evidence of the Forensic evidence without any other evidence would not have led to the conviction of Collins.
14. It is important to highlight that on perusing the affidavit of service of Linus Ogayi filed by the petitioner dated October 14, 2021, I noted that DPP, NTSA and the 4th respondent, the officer commanding police station Kikuyu (OCS) were only served with the petitioner's interlocutory application dated October 5, 2021. All these parties were not served with the main petition I am now considering. I could not find any evidence in the subsequent services carried out where these parties were served with the petition. It is therefore not surprising that all these parties did not file any responses to the petition and indeed did not attend any of the scheduled hearings. It follows that even if the court had found constitutional issues were raised it would not have entertained the petition in the absence of such service.
15. Since I have made a finding that constitutional petition cannot be filed in substitution of civil action, which indeed is the case in this petition, I have tried not to make final determinations on the ownership of the subject motor vehicle in the event the petitioner wishes to pursue her claim under civil action.

Disposition

16. In view of what is stated above, I order this petition be and it is hereby struck out with costs to Collins Odhiambo Okello which costs are assessed at Kshs 150,000.
17. It follows that the order staying the release of motor vehicle KCE 716 A is hereby vacated.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

