



REPUBLIC OF KENYA



KENYA LAW
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**Kabiri v Naivasha & another; Mwaura (Interested Party) (Constitutional
Petition E002 of 2021) [2023] KEHC 17744 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CONSTITUTIONAL PETITION E002 OF 2021**

GL NZIOKA, J

MAY 8, 2023

BETWEEN

PETER MWANGI KABIRI PETITIONER

AND

BASE COMMANDER NAIVASHA 1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

AND

JOSEPH GITUI MWAURA INTERESTED PARTY

JUDGMENT

1. The subject matter herein is a petition dated May 24, 2021 wherein the petitioner is seeking for the following orders: -.
 - a. A permanent injunction, restraining the respondents, their agents from holding his motor vehicle xxxx.
 - b. The court to declare that the motor vehicle xxxx is owned by petitioner and subsequently it be released to him for his use.
 - c. Any other orders the court may deem fit.
2. The petition is supported by an affidavit of even date sworn by the petitioner. He avers that, he is the lawful owner of motor vehicle xxxx bought from one Samuel Ngigi Mburu vide a sale agreement dated, July 18, 2018.
3. That, on June 2, 2022, he was driving the motor vehicle from Nakuru to Nairobi when he was stopped by police officers from the 1st respondents' office, arrested and the motor vehicle impounded and taken to Naivasha Police Station.



4. He further avers that, the respondents have continued to detain the vehicle without any lawful cause and declined to release it yet he has not been charged with any offence. That the motor vehicle is used as means of income for his family. As such he seeks for the release thereof.
5. However, the petition was opposed by the respondents vide grounds of opposition dated July 26, 2021 which states that:
 - a. That the petitioner has failed to state which constitutional rights are alleged to be violated and specifically demonstrate with reasonable precision, the manner in which the respondents have violated his rights, contrary to the established principles in the case of; *Anarita Karimi Njeru v Republic (1979) 1 KLR 154* re-iterated in by the Court of Appeal in the case of; *Mumo Matemu v Trusted Society of Human Rights Affiance, Civil Appeal No 290 of 2012*.
 - b. That the *Constitution* and the *National Police Service Act* mandates the 1st Respondent to investigate any complaint brought to their attention and these proceedings are incompetent and a blatant abuse of the court process and hence do not warrant the intervention of the court.
 - c. That application seeking to have the court make declarations on the ownership of the motor vehicle xxxx is defective as this is an issue of a civil nature and ought not to be elevated to violation of constitutional rights as no constitutional issues have been raised that require the court to interpret {the{>/akn/ke/act/2010/constitution constitution}} as set out in *Muiruri vs Credit Bank Ltd & Another [2006] 1 KLR 385*, Nyamu, J.
 - d. That the *Constitution* only ought to be invoked when there is no other recourse for disposing of the matter as held in *John Harun Mwau vs Peter Gastrow & 3 Others [2014] eKLR*. That the petition offends the doctrine of Constitutional Avoidance.
 - e. That the petitioner has failed to demonstrate the requirements for a grant of orders of injunction as sought in the petition having failed to demonstrate the elements as set out within the case of *East Africa Industries vs Trufoods EA 420* and the case of *Giella v Cassman Brown (1979) EA* affirmed in various superior court authorities.
 - f. That the Petitioner has not adduced any evidence before the court in support of the assertion that the 1st Respondent has possession of the motor vehicle in question xxxx contrary to the provisions of the *Evidence Act*, (cap 80) of the Laws of Kenya which states that he who alleges must prove.
6. The respondents further filed a replying affidavit dated, July 26, 2021 sworn by Corporal Samuel Wambugu, the Investigating Officer attached to the Directorate of Criminal Investigations Naivasha Sub-County. He averred that on August 2, 2015, the interested party made a report at Hyrax Patrol Base, Nakuru stating he had been robbed of his motor vehicle xxxx at gunpoint while ferrying customers from Naivasha to Nakuru.
7. That, the report was recorded under OB 02/02/08/2015 and investigations commenced however the motor vehicle was not recovered immediately. That on June 3, 2020 the said motor vehicle intercepted at Karai road block while being driven by the petitioner and detained at Naivasha Police Station Yard vide OB 02/03/06/2020.
8. That, investigations revealed the interested party had a sale agreement dated December 22, 2013 showing he bought the vehicle from one, Francis Gitonga Kirui and a copy of the log book though he had not transferred the vehicle into his name.



9. That it was further established that the petitioner had a copy of the log book and NTSA search certificate showed the motor vehicle was registered in his name. However, when a forensic examination was conducted on the motor vehicle, it revealed that the chassis number and the engine number had been tampered with.
10. As a result, a case file was opened, witness statements recorded and on August 20, 2020, the file was forwarded to the Office of the Director of Public Prosecutions Naivasha. On October 1, 2020, the Office of the Director of Public Prosecutions informed the 1st respondent that there was no criminal culpability on the petitioner part as he was an innocent purchaser.
11. That, since both the petitioner and the interested party have a claim to the motor vehicle, it is recommended that the petitioner institute a civil suit for the court to determine the ownership thereof, hence the detention of the motor vehicle at the police station pending further orders from a court of law. The deponent avers that the petitioner and interested party were informed of the aforesaid vide a letter dated November 9, 2020.
12. The petition was further opposed by interested party vide his undated replying affidavit filed in court on June 28, 2022. He joined issues with the respondents on the circumstances under the motor vehicle was stolen and results of investigation upon recovery of the vehicle.
13. He averred that he is the owner of motor vehicle xxxx having bought it from Julius Njenga Wambugu vide an agreement dated December 23, 2013. That, the said Julius Njenga Wambugu bought the motor vehicle from one Francis Gitonga Kiruri but had not transferred it into his own name and therefore the log book was still in the name of, Francis Gitonga Kiruri.
14. That he was using the motor vehicle as a taxi operating from the Naivasha to Nakuru main stage and on the night of 1st and August 2, 2015 he was hijacked along the Naivasha- Nakuru highway and the motor vehicle stolen. That as the log book was in the dash board, it was stolen with the motor vehicle. Hence the robbery was reported at Hyrax Police Patrol Base vide OB No 02/02/08/2015.
15. He averred that on June 3, 2020 the officers from Directorate of Criminal Investigation intercepted the motor vehicle at Karai area along the Naivasha – Nairobi Road being driven by the petitioner. That, he presented all documents showing that the motor vehicle was his. Further, he called Francis Gitonga Kirui who recorded a statement with the Directorate of Criminal Investigation confirming that he had sold him the motor vehicle.
16. That, following discovery that the chassis and the engine number of the motor vehicle had been interfered with, the Office of the Director of Public Prosecution recommended that the ownership of the motor vehicle be determined by way of a civil action. As such the petitioner should have filed an ordinary civil suit to claim the motor vehicle.
17. The petition was deposed by way of written submissions. By submissions dated October 23, 2022 the petitioner argued that the respondents do not have a good reason to detain the motor vehicle, as the investigations have taken long and that holding the same is illegal and contrary to the law.
18. Further, Article 40 of the *Constitution* of Kenya, 2010, recognizes a person’s right to own property and there is no doubt that he is the owner of subject motor vehicle. He cited the case of; *Kenya Law Society vs Attorney General and another Constitutional Petition No E327 of 2020* where the right of ownership of property was recognized. As such, it is in the interest of justice the motor vehicle be released to the petitioner.



19. However, the respondents in submissions dated July 26, 2022, reiterated that the petitioner had failed to state with precision which constitutional rights were violated, threatened denied or infringed and placed reliance on the case of *Anarita Karimi Njeru v Republic* [1979] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR where the court held that the petition did not provide adequate particulars of claims relating to alleged constitutional violations of the *Constitution* of Kenya.
20. Further, the provision of Constitution should only be invoked to seek for a remedy where there is no other recourse. The cases of, *John Harun Mwau vs Peter Gastreo & 3 Others* [2014] eKLR and *Minister of Home Affairs vs Bickle & Other (1985) LRC Cost 755* were cited where it was held that, where there is a remedy is available under other legislative provisions or basis, a court will decline to determine whether there has an additional breach.
21. Further, that in the case of; *Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited [2013] eKLR* the court stated that not every ill in the society should attract a constitutional sanction as that should be reserved for appropriate and really serious claims.
22. Further, the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others CA no 77 of 2012 [2014] eKLR* laid out the conditions to be met in granting an injunctive relief being a prima facie case, irreparable injury and a balance of convenience. That, the petitioner had failed to discharge the burden of proof required in the grant of an injunctive relief.
23. The interested party on his part argued vide submissions dated November 28, 2022, that he has fully demonstrated ownership of the motor vehicle and reiterated the petition has not met the threshold of grant of orders sought and fully associated with the respondents' submissions and authorities on the same.
24. He reiterated that the claim herein is civil in nature and not constitutional and cited the case of; *George Abwayo Miheso vs Benson Mbeni Kibetu & 10 others Petition E007 of 2021 [ELC Nakuru]* where the court stated that where there was a clear procedure for redress in an act of parliament the procedure should be followed strictly.
25. Further reliance was placed on *Mike Rubia & Another vs Moses Mwangi & 2 Others* where it was stated that the *Constitution* is not a substitute for redress of all injuries especially where the issue is a pure matter of private law with an adequate remedy.
26. At the conclusion of the arguments advanced by the parties and in considering the same I find that, first and foremost the main issue to determine is whether, the petition meets the threshold of a constitutional petition.
27. In that regard, in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance* [2013] eKLR it was stated that: -

' The principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective. Principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that



regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extract of this principle'.

28. In *Anarita Karimi Njeru v Republic* [1979] eKLR the court stated that: -

' 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.'

29. Pursuant to the aforesaid and in considering the matter herein I note that, the petition is not premised on any a single provision of the *Constitution* and on that ground alone, the constitutional jurisdiction of the court is not well invoked.

30. Further, it does not state any constitutional right that has been infringed or violated (if any or at all). Furthermore, the petitioner is not seeking in the petition for any remedy under the law for, enforcement of constitutional rights. Therefore, indeed the petition does not meet the constitutional threshold and on the ground alone fails.

31. As a consequent of the afore finding it is in the interest of justice to determine where the petitioner's recourse lie. Based on the pleadings and the prayers in the petition for an injunctive order, and the fact that the ownership of the subject motor vehicle is in issue, this is a pure civil claim. Further still for the same to be determined, evidence has to be adduced and the appropriate forum is a civil suit in a civil court.

32. In that regard, the Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR stated that:

(256) The appellants in this case are seeking to invoke the 'principle of avoidance', also known as 'constitutional avoidance'. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'

(257) Similarly the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).

33. In the same vein the matter can also be a subject of a criminal proceedings based on the results of investigations by the respondents and therefore not constitutional in nature. Therefore, the petition herein is not tenable.

34. Finally, to avoid any prejudice that may arise once the civil or criminal proceedings are instituted, this court will not delve into the evaluation of the material before it. However, the respondents having been holding the motor vehicle since June 2, 2020, therefore if investigations are concluded they should charge the petitioner or release the vehicle and/or if the interested party should move to court to enforce his rights and not merely seek the respondents release a motor vehicle.



35. The upshot is that the petition is dismissed for lack of merit with no orders as to costs as each party claims a right of ownership over the motor vehicle.
36. Order accordingly.

DATED, DELIVERED AND SIGNED THIS 8TH DAY OF MAY 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. K. Kimani for the petitioner

N/A for the respondents

Mr. Gichuki for the interested party

Ms. Ogutu court assistant

