



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO. 12 OF 2021

(CONSOLIDATED WITH CONSTITUTIONAL PETITION NO. 13 OF 2021)

IN THE MATTER OF ARTICLES 12,22,23,40,47, 50 (1) AND 258 OF THE CONSTITUTION OF KENYA

1. LENARD BOSIRE MOKAYA

2. JEREMIAH KILEMBA MBILU.....PETITIONERS

VERSUS

1. KISII COUNTY GOVERNMENT

2. MUNICIPALITY OF KISS

3. NAHASHON ONGERI

4. EVANS ONTEGI.....RESPONDENTS

RULING

1. On the 8th June 2021 Constitutional Petition No. 12 & 13 of 2021 were consolidated as the issues raised by the 2 petitioners in their individual petitions had similar issues against the 1st to 4th respondents.

2. The background of this petition as stated in the amended petition filed in court on the 16th June 2021 is as follows; on the 21st May 2021 the 4th Respondent in the company of the reinforcement officers of the 1st and 2nd respondents placed spikes beneath the petitioner's vehicles registration numbers KCF 584J and KBH 881R respectively. That as result the vehicles tyres got damaged. That the security officers bounced on the drivers snatching the vehicle keys and drove to the 2nd respondent's yard. That no reason was given for the forceful seize and detention of the said vehicles.

3. On the 2nd June 2021 the petitioners Lenard Bosire Mokaya (1st Applicant) and Jeremiah Kilemba Mbilu (2nd applicant) filed a Notice of Motion dated the 27th May 2021 brought under Article 23 (3) of the Constitution. In the said application the applicants seek the following orders:

i. That the Honourable Court to issue an order of interim Mandatory injunction directing the Respondents to release motor vehicle registration numbers KCF 584J and KBH 881R to the 1st and 2nd applicants pending the hearing and determination of instant application interpartes.

ii. That the Honourable court to issue a temporary injunction restraining the respondents by themselves their agents, servants and/or employees from seizing and/or detaining the 1st and 2nd applicants motor vehicles pending the hearing and determination of the petition.

iii. That costs of the application be provided for.

4. In addition to the background given in paragraph 2 above the 1st and 2nd applicants aver that they have suffered and would continue to suffer loss and damage with the further detention of the vehicles. They aver that the respondents will not be prejudiced if their application is allowed.

5. The application was opposed. Mr. Oirere submitted that they rely on the replying affidavit sworn by Nahshon Ongeru dated the 15th June 2021. That the vehicle had committed the offence of obstruction and were impounded by the County Enforcement Officers. It was averred that the vehicles were impounded and the drivers of the vehicles were informed of their offences and the penalties that would automatically couple such offences, being obstruction fee-Kshs. 5,000/-, Impounding fee- Kshs. 5,000/-, Non-compliance fee-Kshs. 10,000/- and storage fee- Kshs. 7,000/- totalling Kshs. 27,000/-. That once the fines were paid then the vehicle would be released to the applicants. That the petitioners were informed and they chose to file the present petition so as to escape liability for their actions while at the same time getting an unjustified compensation from the court. That the petitioners are obligated to pay fines for any illegalities committed by himself or his servant/agent and that the court ought to enforce the law.

6. Counsels canvassed the application by way of oral submissions. Mr. Bosire reiterated what is deposed by the applicants in their affidavits. He submitted that the vehicles were detained without any reason. That the applicants have established a prima facie case with overwhelming success. That the respondents have acted against the law and equity does not aid law breakers. That the applicants will suffer irreparably as the vehicles are their source of income. On the response by the respondents the applicants argued that the obstruction stated has not been explained. That the vehicles were in the motion and the officers of the 1st respondent put spikes at the wheels and this caused the vehicles to stop. That the vehicles were on the highway under the Roads Authority and not under the municipality and that if there was any offence committed it was an issue of the traffic police and not the respondent. That the spikes on the road caused obstruction and they do so without any reason endangering the lives of the people in the vehicle. That there was a constitutional issue on fair administration and rights of the petitioners.

7. Mr Oirere too reiterated what is deposed in the respondents' affidavit adding that when the vehicles were detained the officers were discharging their duties and exercising their powers within the precincts of the municipality. that the applicants have not proved that the officers were rude or abusive as alleged. That this court should assist the county government to ensure sanity in the public. That the application should be dismissed so that they can pay the estimated amount.

8. At the close of the hearing of the application this court granted the applicants request to have their vehicles released on payment of the sums required of them by the respondents.

9. I have considered the notice of motion the rival affidavits and oral submissions by the parties. The issue for determination is whether the applicants are entitled to an order of temporary injunction as sought in their application.

10. It is trite law that before an order of injunction is granted the applicants have to demonstrate that they have established a prima facie case with a probability of success, that they will suffer irreparable harm or loss which they cannot be adequately compensated by way of damages and if the court is in doubt it will decide the application on a balance of convenience (**see Giella vs Cassman Brown Co. Ltd 1973 E.A. 358**).

11. In the instant application the applicants are complaining that their vehicles were detained without any reasonable cause and that they had not caused any obstruction as alleged. The respondents on the other hand insist that the applicants had committed an offence obstruction and that the applicants were informed but they chose not pay the fine as indicated in the law governing Kisii County.

12. Though the applicants claim that their vehicles were detained without any reasonable cause they have failed to show that the said detention is unlawful at this interlocutory stage to warrant the order of injunction. To determine whether the acts of the officers were irregular or illegal there is need to adduce evidence of the same. Further the applicants have failed to demonstrate the irreparable loss of harm they will suffer. They opted to pay the fines imposed to have their vehicles released. The applicants will at the full hearing adduce evidence of the illegal acts of the respondents and the loss they suffered. In their amended petition they seek loss of earning and damages. To grant the order of injunction as sought would restrain the respondents from taking action against the 2 vehicles in future or during the pendency of the petition, in the event an offence is committed by the drivers of the applicants' vehicles. In my view I find that the application lacks merit. The petitioners shall have this matter mentioned in the new terms for directions on the hearing of the main petition. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF JULY 2021.

R.E. OUGO

JUDGE

In the presence of:

Miss Nyandoro h/b Mr. Bosire For the Applicants/ Petitioners

Mr. Oirere For the Respondents

Mr. Orwasa Court Assistant