



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 217 OF 2019**

**MOSES MACHARIA KIGO.....APPLICANT/PETITIONER**

**-VERSUS-**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT**

**MUSA YEGO.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The subject of this ruling is the notice of motion application dated 16<sup>th</sup> November, 2020 filed by the Petitioner, Moses Macharia Kigo.
2. The respondents in the petition are also the respondents to the application. They are the Attorney General, the Director of Public Prosecutions, Inspector General of Police, Director of Criminal Investigations and Musa Yego being the respective 1<sup>st</sup> to 5<sup>th</sup> respondents.
3. The Applicant seeks orders as follows:
  - a) **THAT this Application be certified urgent and be heard on a priority basis in the public interest;**
  - b) **THAT there be and is hereby issued an order that the Respondents do immediately pay the Applicant the sum of Kenya Shillings Six Hundred Ninety Thousand (Kshs. 690,000/-) being the losses incurred to restore motor vehicle registration No. KAK 825B to roadworthiness.**
  - c) **THAT there be and is hereby issued an order that in default of payment of the said sum within 30 days the Applicant be at liberty to institute execution proceedings including attachment of Respondents' assets.**
4. The application is founded on the grounds on its face and an affidavit sworn by the Applicant on the date of the application. The gist of the Applicant's case is that public officials involved in and implicated in the culture and practice of impunity in the form of wilful disobedience of court orders should personally be held to account.
5. It is the Applicant's case that on 27<sup>th</sup> May, 2019 a Court in Nyahururu directed that his property including his lorry registration number KAK 825B be released to him. His averment is that although the order was complied with, the lorry was immediately thereafter impounded and driven to the CID headquarters in Nairobi where it was unlawfully held. The Applicant deposes that the lorry was finally released after another order was issued on 30<sup>th</sup> April, 2020. According to the Applicant, by the time his lorry was released it had fallen into disrepair and he had to spend Kshs. 690,000/ to get it back on the road.
6. The Applicant says that the 5<sup>th</sup> Respondent broke the law by refusing to follow the Court Order issued on 27<sup>th</sup> May, 2019 and he did so in order to frustrate his right to ownership of the property in question.

7. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents oppose the application through grounds of opposition dated 16<sup>th</sup> December, 2020. The respondents assert that the application is misconceived, frivolous, bad in law and discloses no ground for issuance of the orders sought and is, therefore, an abuse of court process which ought to be dismissed *sua sponte*.

8. It is the respondents' case that the Applicant has not placed any material before this Court to support his averment that the lorry was not roadworthy at the time it was released to him and the application is therefore based on beliefs, suppositions and untruths.

9. The respondents further argue that the Applicant has not placed any material before this Court indicating that the actions of the 4<sup>th</sup> and 5<sup>th</sup> respondents to impound and detain the motor vehicle were unlawful. It is their contention that they have immunity for acts done in good faith in exercise of their lawful mandates.

10. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents also filed a replying affidavit sworn on 16<sup>th</sup> December, 2020 by Police Constable Boaz Ogaga. The respondents aver that the detention of the motor vehicle by the 4<sup>th</sup> and 5<sup>th</sup> respondents was legal and done in the lawful exercise of their duty and mandate. It is deposed that the Applicant has not demonstrated that the respondents abused their office or powers in the exercise of their lawful mandate.

11. Police Constable Ogaga denies the Applicant's averment that the motor vehicle was towed from the police yard and avers that upon the release of the lorry, the driver replaced the old battery and drove it away. The respondents state that there is no evidence to prove that the Applicant used Kshs. 690,000/- to repair the motor vehicle. It is additionally the respondents' averment that the Applicant has not demonstrated that any repairs done to the lorry were a consequence of the motor vehicle lying idle in the yard and neither has he demonstrated the nature of the repairs done to warrant the grant of the order sought.

12. Through his submissions dated 8<sup>th</sup> March, 2021 the Applicant relies on the holding in **Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR** and submits that he has, through his pleadings, brought forward proof of the resources spent to make his lorry functional and roadworthy after a long period of idleness. His case is that the evidence is contained in a conclusive report compiled by Davis Mudambo & Associates. The Applicant points out that the report has not been countered or challenged by the respondents.

13. The Applicant urges this Court to find that the respondents are liable for the 5<sup>th</sup> Respondent's actions of wilful disobedience of court orders and abuse of official powers to frustrate and intimidate him. The argument is supported by reliance on the decision in **PSHMM (Suing as the administrator ad litem of the Estate of CSM-Deceased) v Attorney-General [2020] eKLR**.

14. On the issue of costs, the Applicant in reliance on the cases of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** and **Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR** submit that he is entitled to the costs of the application.

15. The question to be determined in this ruling is whether the Applicant has established a case for the grant of the orders sought. The Applicant's case is that he suffered financial loss amounting to Kshs. 690,000/- in order to bring his lorry to the condition in which it was before it was impounded and detained by the respondents. His averment is that the lorry had to be towed out of the CID headquarters for servicing in order to make it roadworthy.

16. In his supporting affidavit dated 16<sup>th</sup> November, 2020, the Applicant relies on his annexures and particularly the exhibit marked 'MMK 2' as proof of the repairs done to his lorry. The annexure is supposedly a conclusive report with receipts attached thereto by the audit firm of Davis Mudambo & Associates.

17. I have carefully perused through the court file and the electronic annexures filed by the Applicant and confirm that he has not provided this Court with an exhibit marked 'MMK 2'. The only documents annexed to the affidavit are the exhibit marked 'MMK 1' which is a copy of a Court Order dated 4<sup>th</sup> May, 2020 being an extract of this Court's ruling dated 30<sup>th</sup> April, 2020 which is also annexed as exhibit 'MMK 3'.

18. Questions of proof are always best answered by turning to the Evidence Act, Cap. 80 where the applicable law is provided at sections 107 to 109 as follows:

**107. Burden of proof**

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. Incidence of burden**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**109. Proof of particular fact**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

19. In the matter before me, the burden of proof rested on the Applicant to establish that there was damage occasioned to his lorry; that the damage was occasioned as a result of the 4<sup>th</sup> and 5<sup>th</sup> respondents' action of impounding the lorry and detaining it for one year; and that he used Kshs. 690,000/- to repair the lorry. In my opinion, the Applicant has not discharged his burden of proof on the three identified issues. Having failed to do so this Court only has one course of action, and that is to find that he has not proved his case against the respondents on a balance of probabilities.

20. Even if the Applicant had availed evidence, I do not think that the application could have succeeded. An order can only be granted if it is sought through the instituting pleading like a plaint, petition, originating notice of motion or substantive notice of motion (in judicial review proceedings). The claim for expenses allegedly incurred after the institution of the suit, like in the present case, can only be awarded based on an amended petition. There is no such amendment and there is therefore no nexus between the petition and the claim in the application.

21. In the circumstances of this case, it follows that the application dated 16<sup>th</sup> November, 2020 is without merit and is therefore dismissed.

22. As for the costs of the application, it is trite that costs shall follow the event unless the court for good reason orders otherwise. In the circumstances, the costs for the application are awarded to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents being the respondents who defended the application.

**Dated and signed at Nairobi this 6<sup>th</sup> day of July, 2021.**

**W. Korir,**

**Judge of the High Court**

**Dated, countersigned and delivered virtually at Nairobi this 8<sup>th</sup> day of July, 2021**

**J. A. Makau,**

**Judge of the High Court**