



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

PETITION NO. 7 OF 2019

KHEN KHARIS MBURU.....PETITIONER

VERSUS

INSPECTOR GENERAL POLICE SERVICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

OFFICER COMMANDING RONGAI

POLICE STATION.....3RD RESPONDENT

DOMINIC NDICU GITAU.....4TH RESPONDENT

JUDGMENT

1. Khen Kharis Mburu, the petitioner, filed a petition dated 2nd May, 2019 against the Inspector General of National Police Service, The Director of Criminal Investigations, The officer commanding Rongai Station and Dominic Ndicu Gitau, the 1st, 2nd, 3rd and 4th respondents respectively, seeking a number of reliefs in the form of declarations, an order of mandamus, damages and compensation.

2. The facts giving rise to this petition are that, the petitioner claims to be the beneficial owner of Motor vehicle registration number KCD 790L a Toyota Station Wagon. He avers that he purchased the said vehicle from the registered proprietor, one Bernard Kingori Gichengo. He further avers that on 31st December, 2018, the 4th respondent hired the vehicle from him for 3 months at agreed daily charges of Kshs, 60,000/- making a total of Kshs. 540,000/- for the 3 months.

3. He states that the 4th respondent paid Kshs. 151,000/- leaving a balance of Kshs. 389,000/-; that on 10th February, 2019, the 4th respondent drove the vehicle to Ongata Rongai Police Station and conspired with the 1st, 2nd and 3rd respondents to detain the vehicle in order to shield the 4th respondent from paying the remaining Kshs. 389,000/-. This, the petitioner contends, deprived him the right to the vehicle.

4. The petitioner further states that by letter dated 13th February, 2019 he demanded release of the vehicle but the respondents have refused and failed to release it, thus denying him enjoyment of the right to his vehicle.

2nd respondent's response

5. The 2nd respondent filed a replying affidavit by IP Geoffrey Omwenga of Ongata Rongai Police Station, sworn on 12th June, 2019. IP Omwenga deposes that on 8th February, 2019, the petitioner reported that the 4th respondent had refused to return his motor vehicle, KCD 790L; that the following day, 9th February, 2019, the motor vehicle was traced and the 4th respondent directed to drive it to the police station and that the 4th respondent instructed one Willy Nderitu to drive it to the station which was done.

6. According to the deponent, the vehicle was detained at the station pending further investigations since the 4th respondent claimed to have purchased it from the petitioner while the petitioner also claimed to have purchased the vehicle. He states that both the petitioner and 4th respondent were asked to produce ownership documents but failed to do so. IP Omwenga deposes that since the petitioner claimed that the 4th respondent had hired the vehicle from him he was directed to produce documents to that effect which he also did not do.

7. IP Omwenga further deposes that neither the petitioner nor the 4th respondent produced ownership documents; that on 20th February,

2019, he wrote a letter to National Transport Safety Authority, (NTSA), asking them to confirm ownership of the motor vehicle and that NTSA confirmed that the vehicle was registered in the name of Bernard Kingori Gichingo.

8. He states that the sale agreement attached to the petitioner's affidavit was never produced to him and that he had not seen it before. He denies the petitioner's claim that the vehicle was abandoned at the police station by the 4th respondent. He maintains that it was intercepted at the petitioner's prompting. He contends that the vehicle is at the station due to lack of clear ownership between the petitioner and the 4th respondent.

4th respondent's response

9. The 4th respondent file a replying affidavit sworn on 21st May, 2019 and filed on 22nd May, 2019 in opposition to the motion and petition. He deposes that on 5th January, 2019, he approached one Francis Thimbu, a car sale broker who informed him that he had a vehicle he was selling on behalf of the petitioner. This was Motor Vehicle KCD 790L, a Toyota Fielder Station Wagon; that Francis Thimbu called the petitioner on phone who went to Nairobi west and after negotiations, the petitioner agreed to sell the vehicle to him at Kshs 550,000/-; that he paid a deposit of Kshs. 20,000 by Mpesa and was to pay the balance later because being a weekend, banks were closed.

10. The 4th respondent further deposes that on Monday 7th January, 2019, the petitioner sent a Mr. Wanjiku to collect Kshs.4000,000/- which he paid in cash in the presence of Oscar Wainaina and Francis Timbu. Mr. Thimbu then released the vehicle to him with full authority and knowledge of the petitioner. He states that he paid a further Kshs. 100,000/- on 8th January, and Kshs. 30,000/- on 9th January, 2019 both payments through Mpesa.

11. The 4th respondent denies that he took the vehicle on hire. He however admits that he drove it to the police station on being directed to do so by the police after the petitioner lodged a complaint at the station. He states that he is a bona fide purchaser for value; that he has been in possession of the vehicle with the knowledge and authority of the petitioner as a purchaser and that he is not a hirer. He contends that he has spent an extra Kshs. 195,000/- on the vehicle to make it roadworthy.

Petitioner's submissions

12. Miss Makau, learned counsel for the petitioner, submits highlighting their written submissions dated 18th September, 2019; that the petitioner as the beneficial owner of the subject motor vehicle has been deprived the right to use his vehicle. She argues that the petitioner acquired ownership of the vehicle through purchase from Bernard Kingori; that the 4th respondent hired the vehicle at Kshs, 60,000/- per day for 3 months but he had refused to pay the balance or return the vehicle.

13. According to counsel, the 4th respondent drove the vehicle to the police station and abandoned it there and has conspired with the respondents to detain the vehicle against the petitioner's will, an infringement of his rights for property and a violation of Article 40 of the constitution. Counsel urges the court to find that the petitioner's rights have been violated and allow the petition as prayed.

1st, 2nd, and 3rd respondents' submissions

14. Mr. Meroka, learned counsel for the 1st, 2nd, and 3rd respondents submits orally that although the respondents are not opposed to release of the vehicle, they oppose the claim for damages and compensation. According to counsel, the 3rd respondent asked both the petitioner and 4th respondent to produce evidence of ownership of the vehicle but they did not do so. He contends that the 3rd respondent also asked the petitioner to record a statement which he declined and that although the 4th respondent recorded one, he declined to sign it.

15. Mr. Meroka argues that since there was contested ownership of the vehicle, the 3rd respondent inquired from NTSA over the ownership and the result was that the vehicle is owned by Bernard Kingori Gichingo, a resident of United Kingdom. He further argues that the petitioner should not benefit from his inaction since the sale agreement was only produced on 9th October 2019. He urges the court to decline the petition and more so the reliefs for damages and compensation. The 4th respondent's counsel did not attend court during the hearing and no submissions were filed.

Determination

16. I have considered the petition, the responses and submissions by counsel for the parties. The issue that arises for determination in this petition is whether the petitioner's rights and fundamental freedoms have been violated.

17. The facts giving rise to this petition are straightforward. The petitioner and 4th respondent are persons known to each other. The petitioner contends that the 4th respondent hired his vehicle KCD 790L a Toyota Fielder Station Wagon at agreed daily charges of Kshs. 60,000/- for 3 months making a total of Kshs 540,000/-.The 4th respondent paid Kshs. 151, 000/- leaving a balance of Kshs. 389,000/ and he has refused to return the vehicle to him.

18. The petitioner further contends that the 4th respondent drove the vehicle to Ongata Rongai police station where he has conspired with the 1st 2nd and 3rd respondents to detain the vehicle, thus denying him his right to use of the vehicle in violation of Article 40 of the Constitution.

19. The 4th respondent on his part argues that he purchased the motor vehicle and paid full purchase price to the petitioner and that he took possession of the vehicle with knowledge and authority of the petitioner. He denies the petitioner's claim that he hired it from him.

20. The 1st 2nd and 3rd respondents have denied detaining the vehicle. They argue that the petitioner filed a report that the 4th respondent had hired the vehicle from him but had not only refused to pay but was also holding on to the vehicle. They state that the 3rd respondent's officers directed the 4th respondent to drive the vehicle to the station which he did but neither the petitioner nor the 4th respondent produced ownership documents; purchase or hire purchase agreements to show that they had purchased or hired the vehicle.

21. They further argue that the 3rd respondent's officers investigated the matter and according to records from NTSA, the vehicle is registered in the name of Bernard Kingori Gichingo; that the petitioner declined to record a statement and that the 4th respondent recorded a statement but declined to sign it.

22. From the above facts, the one and only question that arises for determination is whether the respondents have violated the petitioner's rights and fundamental freedoms thus calling on this court's intervention in exercise of its jurisdiction under Article 165(3) (b).

23. What is before court is a constitutional petition. It is premised under Articles 19, 20, 21, 22, 23, 40 and 47 of the Constitution. That is the petitioner's claims hinge on the Bill of Rights. He claims that the respondents have violated and infringed on his rights and fundamental freedoms.

24. Article 19 is generally on the principles of the Bill of rights and the essence of respecting and upholding the Bill of rights and enjoyment of the rights. Article 20 is on the application of the Bill of Rights. It decrees that the Bill of Rights applies to all law, binds all state organs and persons and that everyone should enjoy the right and fundamental freedom to the greatest extent consistent with the nature of the right or fundamental freedom.

25. Article 21 lays down the principle that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill rights and fundamental freedoms in the Bill of Rights. Article 22 is the most important Article in our Constitution and the Bill of Rights for it confers in every person the right to move the court to forestall any violation or threat to violate rights and fundamental freedoms. On the other hand, Article 23 gives the court jurisdiction to deal with claims of violation of rights and fundamental freedoms and to grant appropriate reliefs.

26. The petitioner has relied on Articles 40 and 47 to argue that the respondents have violated his rights and fundamental freedoms. Article 40 states that every person has the right to either individually or in association with others to acquire and own property of any description and in any part of the county. To that extent, a motor vehicle would fit the definition of property under Article 260 of the Constitution.

27. One of the cardinal principles in constitutional litigation is that a party who claims that a right or fundamental freedom has been violated, is being violated or is threatened, must plead with accuracy and precision demonstrating the right violated, or infringed, the article of the Constitution violated and the jurisdictional basis for it. That is; it is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. In Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154, the Court stated;

“ [I]f 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.” (See also Meme v Republic [2004] KLR)

28. This principle was emphasized by the Court of Appeal in Mumo Matemo v Trusted Society of Human Rights Alliance [2014] eKLR, thus:

“[T]he principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden 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 extension of this principle”

29. More importantly, a petitioner must establish through his pleadings and submissions that there is a right guaranteed under the constitution; that the right has been violated or infringed upon and that the respondent is the violator. (See Elizabeth v President of the Court of Appeal (2010) SLR 382)

30. In the present petition, the petitioner was required to establish ownership of the vehicles the source of the dispute. He states that he purchased that vehicle and attached what he says is a copy of the sale agreement. That motor vehicle has not been transferred into his names. The person who sold the vehicle has not sworn an affidavit affirming sale of the vehicle to the petitioner. The right to property is therefore still not resolved. I must also place a caveat that this court is not sitting as a civil court to determine the antagonism between the petitioner and the 4th respondent over the ownership given that both claim ownership of the same vehicle as purchasers. To that extent, the first requirement of establishing that there is a right guaranteed under the Constitution, in this case under Article 40, has not been met.

31. Second, the petitioner states that the respondents conspired to detain the vehicle at the police station. The 3rd respondent states that it was the petitioner who reported that the 4th respondent had refused to return the vehicle to him and pay charges for hiring the vehicle. The petitioner has not refuted the third respondent's version of the events leading to the vehicle being in the station. If the respondents' arguments be true, and I have no reason to doubt them, all the 3rd respondent did was summon the 4th respondent to drive the vehicle to the station for purposes of investigations following the petitioner's complaint.

32. The facts of this petition do not show that any of the petitioner's rights have been violated since he has not established ownership of the vehicle to enable this court apply the constitutional standard of evaluating violation of rights and fundamental freedoms and remedy them where necessary. The petitioner has also not shown that it is the respondents who have violated his rights and fundamental freedoms. What is clear is that the 3rd respondent received a complaint from the petitioner and acted on that complaint and that is how the vehicle ended up in his station. He argues that the vehicle is there pending investigations. This, in my view, is not a violation by the respondents of the petitioner's right to property guaranteed under Article 40 of the Constitution.

33. The petitioner has also cited Article 47, contending that it has been violated too. Article 47(1) guarantees every person the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The petitioner has not attempted at all to show how this particular Article was violated. Sub Article 2 thereof states that where an administrative action violates one's right, the person is entitled to reasons for such action.

34. If I understand the petitioner's argument well, it is that his motor vehicle has been detained by the respondents. However, as already explained above, the vehicle was driven to the police station after the petitioner lodged a complaint there. He really knows why the vehicle is at the station. He does not therefore need an explanation given that he has even declined record a statement when asked to do so.

35. I must emphasize that it is not enough for one to plead that a certain constitutional provision has been violated, is being violated or that a right is threatened with violation. One must prove that indeed that is the case otherwise a court will not exercise its jurisdiction under Article 23(3) as read with Article 165. The Court does not act on mere suggestions or apprehensions. There must be evidence that there is a real violation or threat to violate rights and fundamental freedoms. That is to say, it is not each and every violation of the law that must be raised before the High Court as a constitutional issue. (See *Benard Murage v Fine serve Africa Limited & 3 others* [2015] eKLR).

36. I also agree with the observation in *Harrikinson v Attorney General of Trinidad and Tobago* [1980] AC 265, that:

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individual by...the constitution is fallacious. The right to apply to the High Court under... the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court ... if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

37. I have carefully considered this petition, responses, submissions, the constitution and the law. From all these, I am not persuaded that the petitioner has established his case to require this Court to intervene. For the above reasons, the petition dated 2nd May, 2019 is declined and dismissed. Costs being discretionary, the order I make is that each party do bear own costs.

Dated, Signed and Delivered at Kajiado this 1st Day of November 2019.

E C MWITA

JUDGE