



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

PETITION NO. 29 OF 2017

IN THE MATTER OF THE BILL OF RIGHTS; ARTICLES 22, 23, 159 (2(D) AND 165 (3B) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ARBITRARY ALIENATION OF THE PETITIONER’S MOTOR VEHICLE REGISTRATION NO. KBM 360E, NISSAN SUNNY B15 BY THE OCPD KIAMBU POLICE DIVISION

BETWEEN

AGNES NYOKABI.....PETTIONER

VERSUS

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE...1ST RESPONDENT

THE OCPD KIAMBU POLICE DIVISION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

ALEX KARIUKI JOHN AKA PASTOR WILSON KIARIE.....INTERESTED PARTY

JUDGEMENT

1. This Petition was brought by **Agnes Nyokabi** (the Petitioner) against the police (Respondents) concerning the alleged contravention of Articles 1, 2(1)(2), 3(1), 10(1), 22, 23, 31, 40(1)(3), 156(b), 159(2) and 165(3)(b) of the Constitution. The Petitioner seeks the following declarations:

“a A declaration that the Respondents move to deprive the Petitioner of her motor vehicle registration number KBM 360E and handing it to the interested party without any justifiable reason and against the procedure established by law is unfair, unjust and unconstitutional and an abuse of the law and powers on the part of the Respondents.

b. That dispossessing the Petitioner of her motor vehicle by the Respondents in the manner complained hereinbefore, infringes on the Petitioner’s fundamental rights and amounts to an abuse of the law carrying out their respective duties with impunity and contrary to the law.

c. A declaration that the Respondents have no jurisdiction to deprive the Petitioner of her motor vehicle registration number in the manner they did.

d. A declaration that resonating from the fundamental rights under the Constitution of Kenya, 2010, particularly the right to own property, and that to be deprived of that property save by the procedure established by law, is a violation of the Petitioner’s fundamental rights enshrined in the Constitution.” (sic)

2. She also seeks an order of mandamus directing the 1st and 2nd Respondents to repossess the Petitioner's motor vehicle registration number KBM 360E from the interested party and restore its possession to the Petitioner and General damages for loss of use, wear and tear of the Petitioner's motor vehicle registration number KBM 360E.

The Petitioner's case

3. The Petitioner averred that she is the beneficial owner of the motor vehicle registration number **KBM 360E** and that the 1st and 2nd Respondents having seized the vehicle colluded with the Interested Party to dispossess her of the said motor vehicle. She contended that the Respondents have no adverse claim in respect of the motor vehicle and no charges have been preferred against her; that the vehicle should be restored to her to avoid wear and tear and to prevent the Interested Party from selling the said motor vehicle. She contended that the 1st and the 2nd Respondents action amounts to abuse of their legal and constitutional authority. Lastly, the Petitioner stated that if the prayers sought are not granted she stands to suffer irreparable loss and damage.

The Respondent's Case

4. The Respondents replied to the Petition by way of Grounds of Opposition filed on 20th September, 2017 and a Replying Affidavit filed on 14th December, 2017. In the said grounds of opposition, the Respondents stated that the Petitioner has no *locus standi* to bring this matter before court, and that she has not placed any material before court to demonstrate what prejudice would be suffered if the prayers sought are not granted. Moreover, it was stated that the Petitioner has failed to establish any title of ownership of the suit motor vehicle.

5. In their replying affidavit sworn by Officer Commanding Police Division (OCPD), one **Duncan Nguthu**, the Respondents assert that Mr. Njoroge, the Interested Party's son and Mr. Kimani the Petitioner's son (who are cousins) had exchanged their cars in the material period. Mr. Kimani was to use Mr. Njoroge's car; that Mr. Kimani was involved in an accident and as such allowed that Mr. Njoroge would continue to use his motor vehicle registration number **KBM 360E** (suit motor vehicle). That subsequently, Mr. Njoroge was asked to surrender the motor vehicle at **Kiamumbi Police Station** by a Police Officer. The deponent contended that he intervened in the matter and advised that the dispute was a civil dispute between family members and had the vehicle released to the family of the Interested Party; that there was no conspiracy to dispossess the Petitioner of her property.

6. He deposed further that the Petitioner had not demonstrated ownership of the vehicle. He denied allegations that he has abdicated his obligations to observe the rule of law and that he acted maliciously. Lastly, he contended that he had restored the subject motor vehicle to the special owner in possession to correct the situation where officers at Kiamumbi Police Station had wrongfully seized the vehicle pursuant to the Petitioner's complaint to them.

7. The Petition was canvassed by way of written submissions.

Petitioners' Submissions

8. Counsel for the Petitioner submitted that the Police Officers named have violated her constitutional right to property by seizing her property. It was submitted that the Petitioner is the beneficial owner of the suit motor vehicle and has *locus standi* to file this cause. Counsel submitted that the Respondents and the Interested Party have no claim in respect of the Petitioner's motor vehicle and the motor vehicle should be restored to the Petitioner. It was asserted that the Respondents have abused and /or misused their powers and that their actions in respect of the suit vehicle are malicious, in bad faith and amount to abuse of power. Finally, it was asserted that unless the orders sought are granted, the Petitioner shall suffer irreparable loss and damage. Counsel relied on the case of **Florence Omunga Amukanda & another vs the Attorney General and 2 others (2016)eKLR**.

Respondents' Submissions

9. The Respondents filed written submissions through the Attorney General. It was submitted that where a party approaches the court seeking to enforce her rights, the party ought to specifically set out the alleged right violated and how the same has been violated by the Respondents. Reliance was placed on the case of **Anarita Karimi Njeru vs Republic (No. 1) (1979) 1KLR 154**. The Respondents argued that the Petitioner has not discharged this burden. It was further submitted that the burden of proving ownership of the subject property lay with the Petitioner who has failed to demonstrate her interest or right over the subject motor vehicle.

10. The case of **Dr Rev. Timothy Njoya vs the Hon. Attorney General & another (2014) eKLR** was cited for the proposition that the court deals with real and not hypothetical disputes. It was argued that the Petitioner has not proven any violation of her rights and as such, no mandatory orders can issue and further that the Petitioner has not made a case for the grant of general damages. In conclusion, the Respondents submitted that the Petitioner has not discharged the burden of proof that her rights were indeed violated and that she is entitled to any relief by this Court.

10. The court has considered the matters canvassed in respect of the Petition. The Petitioner's complaint as pleaded was that her right to privacy under Article 31 and to property under Article 40 of the Constitution had been violated by the alleged seizure of the subject vehicle by the Respondents and its subsequent delivery into the possession Interested Party.

11. The Petitioner's case is fundamentally premised on her alleged ownership of the subject motor vehicle, which has been challenged by the Respondents. In her so-called Verifying affidavit sworn in support of the Petition, the Petitioner asserted that:

"I bought the suit motor vehicle from the registered owner Mr. Julius Njoroge on 27th March 2017 and obtained all documents of title from him (the vendor). Annexed hereto and marked "AN2" is a true certified copy of sale agreement relating to the said motor vehicle."

12. In paragraph 2 of the said affidavit the Petitioner deposed that she was the beneficial owner of the subject vehicle and exhibited as annexure “AN1” a copy of the log book. The annexure “AN1” reflects that the registered owner of the vehicle is **Vincent Mwai Njoroge** and not the Petitioner or **Julius Njoroge**, the alleged vendor. The receipt dated 19th June 2017 issued by **Shine Motors** and exhibited as part of annexure ‘AN2’ relates to the purchase of a used engine. Other attached customs documents in annexure ‘AN2’ relate in part to used spare parts and do not appear to have any connection with the vehicle in question, to the Petitioner or to **Julius Njoroge**.

13. Thus, the Petitioner’s asserted ownership of the vehicle is shaky at best. The question is significant because it seemed from the uncontroverted depositions of the Respondents that, the Petitioner’s son may have given the subject vehicle to the son of the Interested Party, after the Petitioner’s son wrecked the vehicle of the Interested Party in an accident admitted by the Petitioner. The question then arises whether the Petitioner’s son or a third party was the real owner whether legal or beneficial of the suit vehicle in this case.

14. The Petitioner’s affidavit does not supply details of the circumstances in which her alleged driver had parked the vehicle at Kiamumbi Police Station prior to it being allegedly seized by the 2nd Respondent, the OCPD. It is not common for ordinary citizens to use police stations to park private vehicles. The Petitioner’s affidavit merely states that her driver had prior to the alleged seizure parked the subject vehicle at the said police station. According to the Replying affidavit, the vehicle was in the possession of the Interested Party or his son when the Petitioner sought help from Kiamumbi police who impounded it and detained it at the station. That to my mind appears a more reasonable explanation for how the vehicle ended up parked at the Kiamumbi Police Station.

15. If this be the case, this was clearly an action taken by the Kiamumbi Police on the Petitioner’s request, and not by the Interested Party. In other words, as the Respondents have deposed, it is the Petitioner or her son who first involved Kiamumbi Police in the dispute over the vehicle and were content as long as the vehicle was impounded and detained at the Kiambu Police Station.

16. It seems that they only protested because the OCPD Kiambu Police Division subsequently intervened and directed that the said vehicle be reinstated into the possession of the party who had its possession prior to its detention by Kiamumbi Police, and that the parties in the dispute seek civil redress. In his Replying affidavit, the OCPD has explained that prior to the directions, he had directed the OCS Kiamumbi Police Station to have the said vehicle brought to his offices from Kiamumbi, and that all disputants be summoned attend. Where is the evidence of illegal and arbitrary seizure by the 1st and 2nd Respondents? The Petitioner appears to have been more than economical with the truth, concerning the material events.

17. In **Anarita Karimi Njeru v R No.1 [1979] I KLR** the court emphasized the need for a party seeking redress for alleged violation of his/her rights to set out with a reasonable degree of precision the nature of his complaint, the provisions of the Constitution infringed and manner in which they are alleged to be infringed. See also **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] e KLR**.

18. There is no doubt that some dispute had arisen between the Petitioner and her son on one hand and the Interested Party and his son on the other hand, regarding the suit motor vehicle, and that police were involved by the respective parties, the first being the Petitioner’s report or complaint leading to the detention of the vehicle at Kiamumbi Police Station. Ultimately, it seems, the OCPD admittedly directed that the vehicle be reinstated into the possession of the person from whom Kiamumbi Police had confiscated the vehicle, and that the parties seek civil redress to their dispute. Thus, this was not case of the OCPD arbitrarily seizing the subject vehicle as purported in the petition. Indeed, on the uncontroverted explanation contained in the Replying affidavit, the OCPD by his intervention acted properly and within the law.

19. This case has all the hallmarks of a civil dispute between the Petitioner’s family and that of the Interested Party, and or other actors and ought to have been presented as such, rather than as a constitutional petition. In **Benard Murage V Fine Serve Africa Ltd and 3 Others [2015] e KLR** the court stated that:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law. Then it is desirable that such a statutory remedy should be pursued first.”

See also **Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd [2013] e KLR**

20. In the case of **Communications Commission of Kenya and 5 Others V Royal Media Services and 5 Others [2014] e KLR**, the Supreme Court of Kenya observed at paragraph 257 that:

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

In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in any other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation. We reiterate that the first port of call should always be suitable statutorily underpinned forums for resolution of such disputes.” (emphasis added)

21. The grievances raised by this petition could be adequately addressed in a regular civil suit. There is no claim that civil remedies were not adequate for the purposes of this case. For all the foregoing reasons, I have found no merit in the petition and will accordingly dismiss it.

DELIVERED AND SIGNED AT KIAMBU THIS 11TH DAY OF DECEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

Mr. Kasyoka for the Respondent

Petitioners absent

Court Assistant - Kevin