



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NO. 277 OF 2016**

**SILVIA WANJIRU GITITU.....PETITIONER**

**AND**

**SCHOLASTICA WAHITO WANJEHIA.....RESPONDENT**

**AND**

**THE CHIEF MAGISTRATE'S COURT MILIMANI.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

By an Amended Petition dated 6<sup>th</sup> December 2016, the Petitioner seeks specific relief as follows:

*Your Petitioner humbly prays for;*

- a. An Order of Certiorari removing Civil Case No. 4827 of 2015 from the Chief Magistrate's Court at Milimani for purposes of reviewing and quashing it;*
- b. An Order quashing proceedings in Civil Case No. 4827 of 2015 for being an infringement on the Constitutional Rights of the petitioner to hold and deal with her property.*
- c. An Order releasing motor vehicle registration number KBP 488P from Kasarani Police to the petitioner;*
- d. Costs herein; and*
- e. Any other/further Orders as the Court may deem fit and just."*

The Petition set out the facts relied on as follows:

**FACTS GIVING RISE TO THIS PETITION.**

**1. Civil Case No. 604 of 2012 filed at The Chief Magistrates' Court – Thika.**

- (a) The respondent, without a single document of ownership and/or entitlement to the petition car filed the above case at The Thika Chief Magistrate's Court seeking the petition car to be declared as belonging to her.*
- (b) This suit was struck out because the respondent's advocate did not have a practicing certificate.*

**2. Civil case No. 4827 of 2015 filed at the Chief Magistrate's Court – Milimani.**

- (a) On 19<sup>th</sup> August, 2015, the respondent, without a single document of ownership and/or entitlement to the petition car filed the above suit (and an application under certificate of urgency) at the Milimani Chief Magistrate's Court seeking the;*
  - i. Petitioner be restrained from using the said motor vehicle*

ii. Court to declare the said motor vehicle as hers.

(b) The respondent claimed to have “**traded in**” motor vehicle Registration No. KBM 054R for the petition car and also **paid Shs. 250,000/-** via **RTGS** an untrue averment because;-

i. Motor vehicle Registration No. KBM 054R did not belong to the respondent but to the **petitioner’s deceased husband, she could not have used it to trade-in** for the petition car;

ii. **The respondent did not adduce evidence of ownership of the motor vehicle Registration No. KBM 054R** to sway the Chief Magistrate’s court to believe her; and

iii. The respondent **never adduced evidence of any RTGS payment to sway the Magistrate into believing her.**

c) On **21<sup>st</sup> August, 2015**, the interested party without satisfying itself that the respondent **had any legal and/or equitable right** to the said motor vehicle proceeded to grant an injunction against the petitioner’s use of the said motor vehicle, of which she is the legally registered owner, thereby denying, violating and infringing on the petitioner’s rights and fundamental freedoms to use the petitioner car.

d) On **26<sup>th</sup> August, 2015**, the petitioner filed evidence showing that;-

i. The petition car belonged to her as she was the legally registered owner.

ii. Motor vehicle Registration No. KBM 054 belonged to her deceased husband; and

(e) On **28<sup>th</sup> August, 2015**, the interested party, with full knowledge that the said motor vehicle was legally registered in the name of the petitioner and that motor vehicle Registration No. KBM 054R belonged to the petitioner’s deceased husband (**and not the respondent**) proceeded to **extend** its **Orders of 21<sup>st</sup> August, 2015**, thereby further denying, violating and infringing on the petitioner’s rights and fundamental freedoms to use the petition car.

(f) On **18<sup>th</sup> December, 2015**, in response to the respondent’s application of **19<sup>th</sup> August, 2015**, the petitioner filed a replying affidavit proving the petition car belonged to her as the legally registered owner and that motor vehicle Registration No. KBM 054R belonged to her deceased husband hence there is no way the respondent could have used it as a trade in vehicle.

(g) On **14<sup>th</sup> January, 2016**, the respondent filed an application under certificate to expedite the speedy hearing and disposal of this matter as is envisaged in the Constitution providing evidence that the said motor vehicle belonged to her as registered owner.

(h) On **15<sup>th</sup> January, 2016**, the respondent’s application was set before Hon. P. Muholi (Mr.) PM who directed counsel for the petitioner to comply with earlier Orders of Hon. M. Chesang (Mrs) RM regarding filing of submissions and slated the matter to be heard on **22<sup>nd</sup> January, 2016** by Hon. M. Chesang (Mrs) RM.

(i) On **22<sup>nd</sup> January, 2016** at the hearing of the petitioner’s application filed on **14<sup>th</sup> January, 2016**, before Hon. M. Chesang (Mrs) RM the following transpired;

(i) Hon. M. Chesang (Mrs) RM noted there were several applications and asked what we wanted to be done pertaining to those applications;

(ii) the respondent’s advocate got leave to respond’

(iii) By consent, it was agreed all applications be canvassed together and submissions to be on all applications; and

(iv) Ruling be on **23<sup>rd</sup> March, 2016**.

(j) On **2<sup>nd</sup> February, 2016**, the respondent’s counsel filed an application to cease acting (instead of Submissions) claiming that the respondent had withheld instructions for a long time.

(k) On **23<sup>rd</sup> March, 2016**, the petitioner’s counsel (together with the petitioner) attended the Chambers of Hon M Chesang (Mrs.) RM for the ruling and was given the file to read what the Hon. M Chesang (Mrs.) RM had written instead of delivering the ruling in the usual and well known manner of reading it out aloud to the parties present.

(l) Hon. M Chesang (Mrs) RM further claimed to be confused by the application in the file and directed counsel for the petitioner to;

i. take a date for any application from the registry;

ii. Appeal her finding if they were dissatisfied; or

iii. Seek directions from the Chief Magistrate.

(m) The petitioner is dumbfounded because;

1. All applications have been spent; and

2. Hon. M Chesang (Mrs) RM declined to deliver a ruling which can be appealed.

(n) On 30<sup>th</sup> March, 2016, the respondent's counsel sought directions from the Chief Magistrate, highlighting the occurrences in **i – m** above and requesting for a ruling but the Chief Magistrate reiterated the findings of Hon. M Chesang (Mrs.) RM, leaving the petitioner with no alternative other than moving this court.

## **Responses**

Despite service, the respondents, with several adjournments for that purposes, did not enter appearance or file any response. The Interested Party was once represented by a Mr. Moimbo, state Counsel, but no responses were filed and the said Counsel did not attend the hearing of the petition although the date thereof was taken in his presence.

## **Hearing of the Petition**

At the hearing the petitioner testified as follows:

*“I am Silvia Wanjiru Gititu. I am the Petitioner. Scholastica Wahito Wanjehia is the respondent. The respondent was asked by my late husband to do errands. The respondent was a neighbor at Gatundu Sometimes she would borrow our car and return. The vehicle was KBP 488P Toyota Premio. When my husband passed away she did not return the vehicle and I went to the Police Station in Thika so that they could recover it for me.*

*The police were not able to recover the vehicle but she went to court at Thika seeking that the car be declared to hers. This was case No. Thika CMCC No. 604 of 2012.*

*The case was dismissed as her lawyer had no practicing certificate. I learnt where the vehicle is kept and I went to report to the Kasarani Police Station and they impounded the car. The police were not able to give me back my car as she claimed to have papers.*

*She came to Milimani and filed a case similar to the one at Thika. The case was Nairobi CMCC No. 4827 of 2015. The court issued Orders. I have a copy of the Order. I shall supply an original of the Order of the court given on 21/8/2015.*

*The Order restrained the police officers from releasing the vehicle to me. I have the logbook indicating that the vehicle belongs to me. Annexed SWG 2 in supporting affidavit Log book No. S494053Y transfer No. 20121601230 KBP 488P. P exhibit No. 1.*

***[Court confirms that the original is the same as the copy set out at Page 27 and 38 of the Petition and the original is returned to the witness]***

*I gave the evidence in the Magistrate's Court at Milimani and the Magistrate refused to give the ruling. We waited for 3 months for the ruling. When we went to the court we were called to chambers. This was on 23/3/2016 the Magistrate, Ms Chesang gave the lawyer the file to read and she said she was confused. She said she would not be able to give a ruling. We were not able to know what to do and we were asked to go to the Registry to seek assistance.*

*The said Scholastica Wanjehia did not produce any document. The car is at Kasarani Police Station. When the Magistrate refused to grant a ruling, my lawyer wrote to the Chief Magistrate. I refer to a file confirming P exhibit No. 2. We were advised to appeal. We were advised orally.*

*I pray for my car and the Orders to be given with costs.*

*My husband passed in April, 2012. My husband's name is Joseph Gititu Mukui. The vehicle was registered in the name of the seller when my husband gave it to the Respondent. The deceased gave it to me. I have her transfer documents. The seller transferred the vehicle to me. The documents were given to me by the deceased. I do not have them because they are the ones, I used to transfer the vehicle to myself. That is all.”*

To understand the dispute before the Court, it is useful to consider in Petitioner' exhibit No. 1 the Affidavit in support of the application in the suit in the Chief Magistrate's Court (Nairobi Milimani Commercial Courts) No.4827 of 2015, the 1<sup>st</sup> respondent set up a case of a co-wife entitled to property which was allegedly bought by her but whose transfer documents for registration were kept by the husband she shared with the Petitioner and upon his death transferred by the co-wife who gained access to the transfer documents. The averments in paragraphs 1-10 of the affidavit of the Respondent sworn of 19<sup>th</sup> August 2015 and filed in the trial court in the said case were as follows:

1. THAT I am the Plaintiff herein well conversant with the facts of this case hence competent to swear this affidavit.

2. THAT on 11/7/2011, I purchased motor vehicle registration number KBP 488P from M/S **Highridge Auto Bazaar Ltd** who were the selling agents of the registered owner one Susan Muthoni Kibaki (copy letter dated 25/7/2012 annexed marked "SWW1" confirming the sale)

3. THAT the log book in the name of the registered owner aforesaid as well as the relevant transfer form was released to me on 3/8/2011 (Copy log book annexed marked "SWW2").

4. THAT I therefore took possession, control and use of the said vehicle as the owner and has been having and using the said vehicle ever since.

5. THAT it is important to be sincere that at the time of the purchase of the suit vehicle, I was co-sharing a husband with the 1<sup>st</sup> defendant herein and it followed that my said logbook and transfer form were kept by my husband aforesaid without me having transferred the vehicle to myself as my husband had undertaken to do it on my behalf.

6. THAT unfortunately, my husband died in April, 2012 having not transferred the vehicle to me as promised and in the scheme of things following the death of a person, the 1<sup>st</sup> defendant gained access to our husband's brief case whereof he kept his things and confiscated my logbook and transfer among other things.

7. THAT almost immediately, the 1<sup>st</sup> defendant inserted her details in the transfer form, as the buyer's section had hitherto remained blank, and presented the documents for transfer of the vehicle to herself and indeed, the 2<sup>nd</sup> Defendant herein has through an official search confirmed that the vehicle is now in the name of the 1<sup>st</sup> Defendant despite my possession, use and control of the vehicle. (Copy search annexed marked "SWW3")

8. THAT upon the said realization, I filed CMCC No. 604 of 2012 at the Chief Magistrate's Court, Thika against the Defendant herein but the suit has since been struck out as my advocates thereof had no practicing certificate, facts of which are well within the 1<sup>st</sup> Defendant's knowledge.

9. THAT in an attempt to dispose me of the said vehicle, on 14<sup>th</sup> August, 2015 the 1<sup>st</sup> Defendant has through the police at Kasarani, Nairobi confiscated the vehicle, detained the said vehicle at the Kasarani Police Station on the basis that the vehicle belongs to the 1<sup>st</sup> Defendant and upon the police summoning me there, I have given them the letter (SWW1) confirming my purchase of the vehicle but the police still continue holding onto the vehicle to my detriment for no reason.

10. THAT unless the court intervenes, the 1<sup>st</sup> Defendant will, through the help of the police, deprive me of my property since she is the registered owner albeit through fraud."

The 1<sup>st</sup> respondent did not, however, come to court to prove the fraud as a rebuttal of the petitioner's right of ownership.

### **Submissions**

In his written submissions filed upon oral hearing of the Petition, Counsel for the petitioner Mr. B. N. Mbutia urged as follows:

*"My lord the respondent used to run errands for the petitioner's husband (deceased) and through the normal course of business she came to be in possession of the Toyota Corona Motor vehicle Registration No. KBP 488P (the "Petition Car") After the Petitioner's husband passed away the respondent refused with the petition car, causing the petitioner to lodge a complaint with the Thika Police. The respondent rushed to the Thika Chief Magistrates' Court in 2012 and filed a suit (CMCC No. 604/2014) seeking to be declared the owner of the petition car which was dismissed because her advocate did not have a practising certificate (kindly refer to document 1 in the petitioner's documents –Plaint (in CMCC No. 4827/2015) paragraph 10, where she admits as much.*

*How a matter moved from Thika to Nairobi goes against territorial jurisdiction and Order 4 rule 1(1)(f). The Supporting Affidavit to the respondent's plaint in CMCC No. 4827/2015; **Scholastica Wahito Wanjehia V Silvia Wanjiru Gititu & The Registrar of Motor Vehicles**, is an affront to Order 4 Rule 1(2).*

*When CMCC No. 604/2012 was dismissed, the petitioner saw that the 1<sup>st</sup> respondent had no intent of returning the petition car and reported it as stolen at Kasarani Police Station who impounded it. The 1<sup>st</sup> respondent then rushed to the Chief Magistrates' Court, Milimani and filed CMCC No. 4827/2015; where without attaching a single document of ownership and confessing that she had filed a similar case in Thika in 2012, she got an injunction against the petitioner – Exhibit in this petition.*

*We submitted a Log Book in the Lower Court, showing that the petition car belonged to the petitioner*

*-Exhibit 2 in petition, and when the 1<sup>st</sup> respondent's advocate saw formidable opposition, he filed an application to cease acting for the 1<sup>st</sup> respondent. As you rightly observed in one of our appearances before you "it is quite shocking that an advocate who had filed the case had decided to run away from the matter". On 14<sup>th</sup> January, 2016 we appeared before Hon. M. Chesang (Mrs) RM, who gave counsel for the 1<sup>st</sup> respondent leave to oppose our application to set aside the injunction he had procured for ex-parte and file submissions. The Hon Magistrate also set the ruling for 23<sup>rd</sup> March, 2016.*

### **Issue for determination**

The petitioner's claim is simply an action of a registered proprietor against an alleged trespasser to property. The claim is however buttressed by pleadings that, in granting an interim injunction to the alleged trespasser, the trial court has aided in violation of the registered owner's right to property. The petition, therefore, seeks the quashing of the proceedings before the trial court for being an infringement of the constitutional rights of the petitioner.

## **Determination**

### ***Protection of Right to Property***

This Court has taken the view that whereas under the Article 40 (6) of the Constitution no protection is afforded a fraudulent acquisition of property, a determination of fraudulent dealing must be made to support the application of the exemption of Article 40 (6) to the right of property. In *Mohansons (Kenya) Limited v. The Registrar of Titles and 4 Ors.* Mombasa H.C. Petition No. 103 of 2012, I considered the defence of fraudulently acquired property to a petition for protection of right to property under Article 40 of the Constitution in the context of an application for conservatory Order over a parcel of land, and held as follows:

***“17. The petitioner as a registered proprietor of the suit property has established a strong prima facie case for the grant of the reliefs for the protection of his property rights sought in the petition. The petitioner as registered proprietor asserts his constitutional right to protection of property under Article 40 of the Constitution. If the 2<sup>nd</sup> Respondent contends that the title of the petitioner is vitiated by fraud, misrepresentation or the certificate of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said respondent to move the appropriate Court by suitable proceedings in that behalf for such determination. In the absence and prior to any such determination, the petitioner is entitled to protection of his undoubted property rights.”***

As regards the right to property in a motor vehicle, section 8 of the Traffic Act provides as follows:

### **8. Owner of vehicle**

*The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.*

The petitioner produced a **Log Book Serial No. S494053Y Transfer No.20121601230 dated 08/06/12** for the motor vehicle KBP488P indicating her as the registered owner. It was incumbent on the 1<sup>st</sup> respondent as the person seeking to challenge the registration of the petitioner as the Owner of vehicle to adduce rebuttal evidence that would warrant the Court to upset the presumption of ownership by virtue of the petitioner's registration.

In the absence of such rebuttal, this Court is bound by **Article 22** of the Bill of Rights to enforce the petitioner's constitutional right to property under Article 40 (1) of the Constitution to the ownership of the motor vehicle, which is also statutorily underpinned by section 8 of the Traffic Act.

### ***Discretion of the trial court***

I think that the exercise of the Bill of Rights and supervisory jurisdiction of the High Court as invoked by the pleadings in the Petition herein must be circumscribed in the same way as the exercise of the appellate jurisdiction of the Court. As held by the Court of Appeal for East Africa in *Mbogo v. Shah* [1968] EA 93, an appellate court may only interfere with the discretion of the trial court in special circumstances as follows:

*“[A] Court of Appeal should not interfere with the exercise for discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”*

As the vehicle is held at Kasarani Police Station Nairobi, I would consider, without deciding, that the trial court had jurisdiction to entertain the matter in Nairobi CMCCC No. 4827 of 2015 despite the striking out of previous proceedings in the Thika Chief Magistrate's Court Civil Case No. 604 of 2012 because the latter case had not been heard on its merits. However, the exercise of discretion in granting the temporary injunction pending trial was erroneous on the principles of *Giella v. Cassman Brown* [1973] EA 358 because the respondent in the case (petitioner herein) is the registered proprietor of the motor vehicle whose title is protected by provisions of both Statute and the Constitution of Kenya, respectively section 8 of the Traffic Act and Article 40 of the Constitution, and as a result there has been an injustice in preventing the registered owner of the fruits of ownership without lawful cause. In these circumstances, a constitutional court as a higher court; the appellate court; or the judicial review court are entitled to interfere with the exercise of discretion of the subordinate trial court.

However, such interference with the trial court's discretion would be limited to discharging the interlocutory injunction pending determination of the suit as the 1<sup>st</sup> respondent is entitled to Article 48 right of access to justice in moving the Court to demonstrate, in terms of Article 40 (6) of the Constitution, that the registration of the motor vehicle in the name of the Petitioner herein was obtained fraudulently as claimed in the said suit.

## **Orders**

Accordingly, for the reasons set out above, the Court grants the Petitioner's Amended Petition herein dated 6<sup>th</sup> December 2016 to the extent only that -

1. There shall be an Order of this Court **discharging** the Order of interim injunction of the trial court in Milimani Commercial Courts Civil Case No. 4827 of 2015 made on 21<sup>st</sup> August 2015 and subsequently severally extended, restraining the Officer Commanding Police Station, Kasarani Police Station and or the DCIO thereof from releasing Motor vehicle KBP488P to the 1<sup>st</sup> defendant therein (petitioner herein); and

2. There shall be a further Order in terms of prayer (c) of the Petition herein that the Officer Commanding Police Kasarani Police Station and or the DCIO thereof do forthwith release Motor vehicle KBP488P to the Petitioner herein.

There shall be no Order as to costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF MARCH, 2018.**

**E C MWITA**

**JUDGE**

**In the presence of:**

.....,.....**for the Petitioner.**

.....**for the Respondent.**