



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 56 OF 2017

IN THE MATTER OF: ARTICLE 22(1) AND ARTICLE 23 OF THE KENYA CONSTITUTION 2010 – ENFORCEMENT OF BILL OF RIGHTS OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 40(1) & (3) PROTECTION OF THE RIGHT TO PROPERTY OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLE 41 OF THE CONSTITUTION AS READ WITH ARTICLE 47(1-3) ON FAIR ADMINISTRATIVE ACTION

AND ARTICLE 73(2) A-E, 75(1-3) ON INTEGRITY AND CONDUCT OF STATE OFFICERS OF THE CONSTITUTION OF KENYA

BETWEEN

1. ANDREW KAGGWA MANYASA

2. MARY NYARESO NYANDIKO PETITIONERS

AND

1. COUNTY GOVERNMENT OF MOMBASA

2. REGIONAL POLICE CO-ORDINATOR,

COAST REGION

3. THE HON. ATTORNEY-GENERAL RESPONDENTS

JUDGMENT

1. The petition before the court is dated 12th October, 2017. The Petitioners are husband and wife respectively and are the owners of motor vehicle registration number KAX 896M Nissan Matatu, which was reportedly stolen on 17th June, 2016 and was later found abandoned at stadium area on 20th June, 2016 by the officers of the 1st Respondent. The said motor vehicle was later transferred to Dog Section Police Station on 10th July, 2016 for further investigations. The vehicle was later found at Makupa Police Station from where the 1st Respondent towed it to their yard in Tudor. The Petitioners were never informed about the whereabouts of the said motor vehicle until the Petitioners visited the 1st Respondent's yard.

2. The Petitioners' case is that when they sought to take possession of the said motor vehicle the 1st Respondent demanded Kshs. 400,000 being alleged storage charges. The Petitioners case is that the amount being demanded is equal to the value of the said motor vehicle and amounts to the Petitioners being denied their rights to property. The Petitioners aver that the Respondents action are illegal, unconstitutional

and prejudicial to their proprietary rights.

3. For those reasons the Petitioners pray for:

- (a) A declaration that the Petitioners constitutional rights to a fair trial have been breached.
- (b) A declaration that the demand of towing services and storage fees by the County Government of Mombasa is unconstitutional and illegal.
- (c) An order directing the Respondents to release the motor vehicle Registration Number KAX 896M Nissan Matatu to the Petitioners.
- (d) Relief

The Response

4. The Petition is opposed by all the Respondents. The 2nd and 3rd Respondents filed Grounds of Opposition on 9th November 2017 and a Replying Affidavit sworn by Dominic Kiptum on 1st December, 2017. The said Replying Affidavit was in reply to the Notice of Motion application dated 12th October, 2017, but which the parties abandoned and opted instead to hear the petition. The said Replying Affidavit remains on record as being answer to the petition. The 2nd and 3rd Respondents' case is that the petition is frivolous and an abuse of the process of the court as neither the 2nd nor the 3rd Respondents have the custody of the alleged motor vehicle Registration Number KAX 896M. These Respondents further aver that the petition is an afterthought and an elaborate scheme by the Petitioners to evade payment of towing and storage fees by the county Government.

5. On its part the 1st Respondent opposed the petition vide a Replying Affidavit sworn on 8th November, 2017 by Abdalla Omar Ali. The 1st Respondent states that the vehicle was towed to their yard for storage since the County Government has authority over traffic issues. The 1st Respondent has no problem releasing the said motor vehicle to the Petitioners provided all the storage charges accumulated to date are paid.

Submissions

6. Parties filed submissions which I have considered. I raise the following issues for determination:

- (i) Who owns the suit motor vehicle?
- (ii) Is the demand for Kshs. 400,000 storage and towing charges a breach of property rights of the Petitioners?

7. On the 1st issue, it is not in doubt who owns the suit property. The property is jointly owned by the Petitioners (see paragraphs 3, 4 and 5 of the Supporting Affidavit sworn by the 1st Petitioner). The ownership claims have not been disputed. In fact in this petition the only issue for determination is the issue of alleged storage charges. In this matter, the facts are that the suit motor vehicle was stolen and later found abandoned, and after sometime, taken to the yard of the 1st Respondent for storage. The blame against the 2nd and 3rd Respondents are therefore baseless and ill founded, and I accept submissions that the 2nd and 3rd Respondents ought not to have been sued in this petition. They merely came into contact with the suit motor vehicle in ordinary cause of business. They also do not have the custody of the said motor vehicle. It is unfortunate that the Petitioners joined them to this suit.

8. As to whether the demand for storage charges or towing charges are unconstitutional the answer in my view is no. There is nothing unconstitutional about demanding money for services rendered. The Petitioners do not expect that the suit motor vehicle would be towed for free or that the same would be stored for free. However, where the demand made is unreasonable, that is, to the extent of the demand being half or even the same with the suit subject matter, this would be interpreted as an attempt to deny a party of a right of property. However, I have not seen a valuation of the said motor vehicle to know how much it is worth. And although the Petitioners claim that a demand for Kshs. 300,000 or Kshs. 400,000 has been made for storage and towing charges, no copy of such demand was placed on record. This court therefore cannot know what has been demanded so as to determine whether or not the same amounts to a denial of proprietary rights.

9. In the circumstances this court makes the following orders:

- (a) That the 1st Respondent shall forthwith release the motor vehicle Registration No. KAX 896M Nissan Matatu to the Petitioners upon the Petitioner's paying reasonably assessed towing and storage charges.
- (b) That if the parties are not able to agree or what is reasonable the 1st Respondent shall file in this court within seven (7) days of this Judgment the schedule of assessment of both towing and storage charges, and this court will determine whether the same amounts to a violation of constitutionally guaranteed right to property.
- (c) All parties in this matter shall bear own costs of the petition.

That is the Judgment of the court.

Dated, Signed and Delivered in Mombasa this 11th day of June, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mwanjeje for 2nd and 3rd Respondents

Mr. Makori holding brief Kibara for 1st Respondent

Mr. Kaunda Court Assistant