



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 43 OF 2013

JANE KAWIRA MWENDA.....1ST PETITIONER

MOFFAT ONDARI KWAHU.....2ND PETITIONER

CIC INSURANCE GROUP LTD.....3RD PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Petition dated 15th October 2013 was filed by Jane Kawira Mwenda against the Republic seeking that the motor vehicle Registration KBM 384 M Toyota Saloon be released to the applicant unconditionally that the Respondent do compensate the Petitioner for non-user of the motor vehicle from the date of detention to the date of release. The Petitioner also sought for costs.

The Petition is supported by the affidavits of Jane Kawira Mwenda sworn on 13th October 2013. She avers that she bought the motor vehicle registration KBM 384 M Toyota Saloon from John Muiruri on 30.4.2012 at Thika when it was advertised. She annexed a copy of agreement for sale.

She also annexed at paragraph 3 copy of log book, copy of duly signed transfer forms, identification and passport of the original owner – JKM 2(a) (b) and (c). she averred that on 2.10.2013 some two men who identified themselves as officers from flying squad Mikinduri arrested her husband and took possession of the Motor vehicle while he was coming from the garage in Meru Town.

That her husband was told the Motor vehicle was suspected to have been stolen. That she presented all the original documents to the officers which they were still holding in their custody.

That since detention of the Motor vehicle, she had not been told what crime she committed and everytime she demanded to know why her motor vehicle was in custody she is always told to wait for the complainant. She averred that no one had made any complaint against her and she feared the flying squad officers were not upto any good and she feared she may lose her lawfully acquired motor vehicle in suspicious circumstances.

She averred the last time she saw the vehicle the engine area had been tampered with and she feared it may be messed up mechanically. She further averred that she has a right to be treated with dignity and her property protected by the law from being taken away arbitrarily. She sought that the motor vehicle be released to her as she is bond to suffer loss of user of the motor vehicle.

In Reply to the petition Isaac Ong'ando Nyamweya in affidavit sworn on 11th November 2013 averred that the motor vehicle sought to be released has 2 chassis numbers for motor vehicle registration KBM 384 M and KBH 237 M.

That KBH 237 M was stolen from Ruiri and a report was made at Ruiri police station. He said that motor vehicle registration KBM M – the chassis was tampered with.

He averred that CIC Insurance Group of Companies complained through their branch manager to the effect that Motor vehicle Registration KBH 237 R which was registered in the name of Moffat Ondari and insured by them had been stolen and they had compensated the loss fully.

It was averred the petitioner was informed of reason of arrest and detention of the motor vehicle which is in good custody at Mikinduri police station. Directions were taken that petition be canvassed by way of written submissions. The petitioners submissions are that she had produced duly signed transfer form, ID and passport of the original owner and that the Bill of Rights confers a right to every person to acquire and own any property of any description and in any part of Kenya as per Article 40(a) and (b) of the Constitution of Kenya 2010. It was submitted that the Respondents violated the constitution by not giving back the motor vehicle after the Petitioner presented the original documents that proved ownership. That fair administrative action was not exercised when the Respondents failed to give written reasons for the detention of petitioner's motor vehicles.

That in order to observe, respect, protect and promote and fulfil the rights and fundamental freedoms in Bill of Rights, it will only be just and expedient if the motor vehicle is released to the petitioner while police are still carrying out investigations. It was submitted that the petitioner had proved she acquired good title and ownership of motor vehicle registration KBM 384 M Toyota Saloon and it should be released to her unconditionally. A further supporting affidavit was sworn by Lydia Mwangi Claims Manager with CIC Insurance Group Ltd the 2nd applicant interested party who were joined to the petition by application dated 17.7.2017 annexed logbook in the name of Wambua Nganda which KRA in a letter dated 3rd February 2014 confirmed upon verification and examination as being fake – as per annexure LM4.

She annexed LM1 (b) Records of Motor vehicle Registration KBM 384 M which establishes belongs to Oneya Nyalik Vincent. Police Abstract on loss of 1st Interested parties can register KBH 237 R Toyota Allion is also annexed together with the owners statement to police LM2 (a) and (b) Lydia Mwangi also annexed to her affidavit acknowledgement of receipt of money to compensate Moffat Ondari Kwalu for the loss of Motor Vehicle Registration KBH 237 R by CIC Insurance. Upon the interested parties being joined in the petition they filed a joint petition seeking a declaration that the motor vehicle confiscated by the flying squad on 2.10.2013 and which is held at Mikinduri police station, though bearing plate No. KBM 384 M and super – imposed Chassis plate No. NZY 240 – 5009807 is an actual fact motor vehicle Registration KBH 237 R bearing Chassis No. XX7240 – 0014094 which is registered in the name of Moffat Ondari Kwalu the 2nd Petitioner herein and that an order commanding the 2nd Respondent be issued to release the said Motor vehicle to CIC Insurance Group Ltd, the 3rd petitioner herein. They also sought for costs of suit.

The 2nd and 3rd Respondents consequently filed submissions in which they urged that the Motor vehicle held at Mikinduri police station should be ordered to be released to the 3rd petitioner as it is fully indemnified the 2nd Petitioner. It was also urged that 1st Petitioner be condemned to pay costs as she failed to exercise any due diligence when purchasing Motor vehicle from one John Muiruri when the alleged logbook was in the name of Wambui Nganda.

From the 1st petitioners petition, the supporting affidavit and annexures thereto as well as submissions and inconsideration of the Replying Affidavit of the investigating officer Isaac Ongando Nyamweya and the petition of 2nd and 3rd petitioners as well as the affidavit of Lydia Mwangi and supporting annexures. It is obvious that the 1st petitioner bought a motor vehicle that did not belong to the alleged vendor without considering the official records from KRA and NTSA, the 1st petitioner in an annexure JKM 1 shows she bought the motor vehicle from John Muiruri but the alleged logbook is in the name of Wambua Nganda whose copy of PIN certificate and passport photo she annexed. There is no cause in the agreement that explains why John Muiruri is selling to her instead of Wambua Nganda and there is no explanation how John Muiruri came to be in possession of the Motor vehicle.

The copy of transfer form JK 2(b) doesn't have any contact for the said Wambua Nganda save for a postal address for Mombasa and yet the 1st petitioner said that she bought the can in Thika. Neither her name nor the name of the person who sold to her is in the transfer form. The transfer form is blank and cannot be taken as valid in relation to transfer of Motor vehicle.

It is obvious that the 1st petitioner either didn't exercise due diligence or she is part of the racket/cartel that steals vehicles and changes registration numbers for their own benefit.

The Respondent through Isaac Ongando Nyamweya the investigating officer established that the vehicle the petitioner claims was stolen from her husband was actually stolen from Moffat Ondari and Registration number changed to KBM 384 M Toyota and Chassis number also changed. Investigations established that the genuine motor vehicle Registration KBM 384 M Toyota was registered in the name of Oneya Nyalek Vincent and not Wambua Nganda – LM5 (b). It was also established as per LM4 that log book S/No. R 09099978 P- LM (a) is fake.

Following the theft which was booked as per police abstract LM2 (a) the registered owner of the motor vehicle was compensated by CIC Insurance Group Ltd. In the circumstances the 1st petitioner's petition cannot stand. The Rights of the petitioner under Article 40 and 47 of the constitution cannot be protected where the same has not crystallised and especially where the protection of the alleged rights are infringing on another person's Constitutional Rights.

The Motor vehicle in question was unlawfully acquired and Article 40(b) expressly provides that the rights under Article 40 do not extend to it.

It is hereby declared that the motor vehicle in question held at Mikinduri police station shall forthwith be released to 3rd petitioner by the Respondents. The 1st Petitioner shall pay costs of the petition to the 3rd petitioner and the 1st Respondent.

Order accordingly.

HON. A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 11TH OCTOBER 2018.

In the presence of:

C/A: Penina

Mr Thangicia Advocate Holding brief for Mwenda Mwarania for 2nd and 3rd Petitioner.

Mr L. Kimathi Kiara Advocate for 1st Petitioner.

Copies to be supplied.

HON. A.ONG'INJO

JUDGE