



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 274 OF 2012

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF THE APPLICANT'S RIGHT TO OWN
PROPERTY**

BETWEEN

MIACHEL MUTUKU MULINGE PETITIONER

AND

THE ATTORNEY GENERALRESPONDENT

JUDGMENT OF THE COURT

1. The Petitioner herein has filed this Petition dated 26/07/2012 seeking the following reliefs:-

(a) A declaration that the Petitioner's right to own property has been violated by the O.C.S. Kalawa Police Station when under his direction the Petitioner's cow was taken and given to a third party which amounted to the violation of Article 40 of the Constitution.

(b) A declaration that whoever allegedly sold the cow was a thief did so without authority of the Petitioners and could therefore not confer any good title to a third party.

(c) A declaration that the continual deprivation of the cow from the Petitioner is a continued infringement of his rights and specifically the right to acquire and own property in any part in Kenya and the actions by the OCS Kalawa Police station have occasioned the Petitioner loss.

(d) An order directed to the Respondent to have the Petitioner's cow immediately restored to him or in the alternative the Petitioner be paid Kshs.30,000/= as compensation for the conversion of his cow.

(e) The Respondent to bear the costs of the Petition.

(f) Such other orders as this Honourable court shall deem just.

2. The Petitioner's case is that he is the owner of a cow which was stolen from his home at Kalawa on 16/04/2011 and in which same was later recovered at Kalawa market and suspect arrested. It is the Petitioner's case that the matter ended up at Kalawa Police Station where the matter was amicably

resolved and the cow handed back to the Petitioner only for the Police to subsequently seize it and that attempts to recover it back has been thwarted by the OCS Kalawa Police station and hence the present Petition. The Petitioner contends that his Constitutional right to own property under Article 40 of the Constitution has been infringed and/or contravened.

3. The Petition is opposed by the Respondents who filed Grounds of Opposition dated 27/09/2012 as follows:-

(a) That the Petition lacks clarity and precision in setting out the alleged violations.

(b) That the Petition discloses no cause of action against the Respondent.

(c) That the basis of attributing the alleged action upon the Government has not been set out.

(d) That the orders sought by the Petitioner are not tenable against the Respondent as the Petitioner does not disclose how his rights under the Constitution have been contravened and infringed and how he suffers the loss stated thus he is not entitled to any compensation as stated.

(e) That the Respondent is wrongly enjoined as a party as the Petitioner does not show how the Respondent has failed or abdicated his duties under Article 156 of the Constitution therefore the orders sought cannot issue against a person who is not a party to the proceedings.

(f) The Petition filed by Petitioner is defective in substance and does not come under any Provisions of the law.

4. With the leave of the court, parties filed submissions. It was submitted for the Petitioner that the Petition herein is grounded in law and the Respondent has violated his right to property as provided in Article 40 of the Constitution. It was further submitted that the Police at Kalawa have failed to perform their work by investigating and Prosecuting the culprits involved in the theft of the Petitioner's cow. It was also submitted for the Petitioner that the Respondent has not discharged its duties pursuant to the Provisions of Article 156 (6) of the Constitution. Reliance was sought in the case of **OMAR SHARIEF MOHAMMED =VS= PERMANENT SECRETAY MINISTRY OF INFORMATION & COMMUNICATION & 3 OTHERS [2014] eKLR at KERUGOYA HIGH COURT.**

5. The Respondent submitted that this Petition should not be granted since there is no proof at all on the ownership of the subject matter. Further it was submitted for the Respondent that the Petitioner has failed to enjoin the person who reportedly took the cow. Further it was submitted for the Respondent that the Petitioner has failed to set out the specific violation in the Constitution and the manner in which the right has been violated and relied on the case of **ANARITA KARIMI NJERU =VS= REPUBLIC [1979] IKLR 154.** Finally the Respondent submitted that the rights envisaged under Chapter 4 of the Constitution are subject to limitation and are not absolute and that the mere statement of violation of fundamental rights and freedoms do not amount to actual violation without proof of violation. The Respondent sought for the dismissal of the Petition.

6. I have considered the Petitioner's Petition dated 26/07/2012 as well as the rival submissions and the cases cited. The only issue I raise for determination is whether or not the Petitioner has presented sufficient grounds to warrant this court to grant the prayers being sought. First and foremost, the issue in contention is the alleged seizure of one cow from the Petitioner's homestead. The Petitioner claims that the said cow was seized by the police based at Kalawa Police Station and have refused to restore it back to him. The Petitioner avers that his rights to property under Article 40 of the Constitutions has been violated. Indeed the said Article 40 provides as follows:-

“Subject to Article 65, every person has the right either individually or in association with others to acquire and own property

(a) of any description; and

(b) In any part of Kenya.”

The Petitioner seeks this court’s protection as he feels that his property has been unlawfully expropriated. However a perusal of an agreement made on 17/04/2011 between the Petitioners and one Patrick Muindi Mutie at Kalawa Police Station seems to confirm that the Petitioner together with his brother one Katumo Mulinge and the said Patrick Muindi Mutie had reached an understanding that the issue of the cow was abandoned with a further undertaking by each side that they would not pursue any further complaint to the police. It is therefore surprising that the Petitioner now claims the police have failed to pursue the matter yet he had excused them from such responsibility. Again the Petitioner has not shown that a subsequent report was even booked as there are no records of an occurrence book reference at Kalawa Police Station. The Petitioner confirmed that he has knowledge that the said cow had been sold to the third party namely Patrick Muindi Mutie by the Petitioner’s lost brother one Koti Mulinge. The Petitioners has also not enjoined the said Patrick Muindi Mutie who apparently is in possession of the cow having bought from the Petitioner’s long lost brother Koti Mulinge. This explains why the police at Kalawa were directing the Petitioner to refund the purchase price of Kshs.24,000/= to the buyer in order to get back the cow. The Petitioner appears to have decided to keep his long lost brother and the buyer off the radar and concentrated his grievances upon the OCS Kalawa Police Station. The Petitioner was obliged to reveal all what he knows surrounding the disappearance of the cow but he has deliberately withheld the same from this court. I find he has gone against the principles of equity that **“He who comes to equity must come with clean hands.”** The Petitioner in his Petition has not set out the specific violation and the manner in which the right has been violated. In the case of **ANARITA KARIMI NJERU =VS= REPUBLIC [1979] IKLR 154** it was held:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves reference to the Constitution, it is important (if only to ensure justice is done to his case) that he should set out with reasonable degree of precision that which he complains the provision said to be infringed and the manner in which they are alleged to be infringed.”

A similar view was held by the court of Appeal in the case of **JOHN HARUN MWAU & 3 OTHERS =VS= ATTORNEY GENERAL & 2 OTHERS [2012] eKLR**

7. The Petitioner in prayer (b) of the Petition is of the view that whoever allegedly sold the cow was a thief and did so without authority of the Petitioner and could not therefore confer any good title to a third party. Hence it is clear that the Petitioner is aware that the said cow was indeed sold but has not enjoined the alleged buyer and seller into these proceedings. Again as noted above, there is no evidence that there is a subsequent report lodged to the police after the initial one was amicably settled on 17/04/2011. If such a complaint had been made and the police fail to act upon it, then the Petitioner still has a right to mount private prosecution against the wrong doers. He has not taken such a course of action so far and there is no evidence that his attempt to do so has been thwarted or frustrated by the Respondent.

8. The upshot of the foregoing observations is that it is the finding of this court that the Petitioner’s Petition has not met the threshold in order to merit the prayers sought. The Petition dated 26/07/2012 lacks merit. The same is ordered dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in court at Machakos this **11th** day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

.Langalanga for Mutia for Petitioner.

.C/A: Kituva.....