



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL PETITION NO. 41 OF 2014**

IN THE MATTER OF: PETITION UNDER (THE PREAMBLE OF THE  
CONSTITUTION OF KENYA AND UNDER ARTICLE 2)

AND

UNDER ARTICLE 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 33,  
40

AND

ARTICLE 47,48, 50, 51, 73, 75, 159(2) AND 165(3)

GEORGE MORARA OMARE.....PETITIONER

VERSUS

1. RAMA DZIWE JUMA

2. BENSON BARASA

3. ADAN ALI

4. INSPECTOR GENERAL OF POLICE

5. THE HON. A.G.....RESPONDENTS

**JUDGMENT**

1. In a Petition dated 4<sup>th</sup> June, 2014 and filed on 2<sup>nd</sup> July, 2014, the Petitioner herein sought the following orders:-

**“(1) A declaration that the Respondents’ acts jointly and severally were in contravention and breach of the Petitioners’ rights and fundamental freedoms as provided under Articles 19, 20, 21, 22, 23, 25, 27, 28, 29,31, 33, 40, 47, 48, 50 and 51 of the Constitution of Kenya.**

**(2) A declaration that the Petitioner had acquired proprietary rights as beneficial interest in the motor vehicle Registration No. KAN 665A Nissan Matatu as a private property and thus the Respondents’ acts jointly and severally were in breach of his Constitutional Rights under Article 40**

**(1) and (2) of the Constitution that every person has a right to acquire and own property of any description and that he cannot be arbitrarily deprived of property of any description.**

**(3) A declaration that the Petitioner is entitled to special damages, exemplary damages, punitive damages, and general damages as compensation.**

2. The Petition was supported by the Affidavit of the Petitioner George Omare Morara sworn on 2<sup>nd</sup> July, 2014 and the grounds on the face of the Petition.

3. The Petition was however opposed, and in the Grounds of Opposition dated and filed on 5<sup>th</sup> March, 2015, the Attorney-General for the Respondents stated that:-

(1) the application is misconceived, frivolous, vexatious and abuse of the process of court;

(2) the orders sought are untenable and a nullity;

(3) the applicant is guilty of laches, and

(4) the Applicant is the author of its own misfortunes.

### **THE FACTS**

4. I have reviewed very carefully, the Petitioner's Affidavit in support of the Petition as well as the grounds thereon. I have similarly reviewed the Replying Affidavit of Adan Ali, the Third Respondent herein, who in particular is alleged to have contravened the alleged rights of the Petitioner.

5. What clearly emerges from the Supporting Affidavit of the Petitioner is a claim that the First Respondent borrowed a sum of Kshs. 200,000/= from the Petitioner on security of the motor vehicle KAN 665A Nissan Matatu (the motor vehicle), and in addition to the stated sum of Kshs. 200,000/= the expenses for engine repairs and other essential repairs would be added and become part of the loan moneys. The Petitioner would also be entrusted with the logbook and other essential documents in relation to the motor vehicle would be held by the Petitioner.

6. Though the agreement of 18<sup>th</sup> September, 2011 only refers to Kshs. 200,000/= the Petitioner claims that he lent 137,000/= to the First Respondent for engine repairs making the claim Kshs. 337,000/=.

7. The Petitioner claims that after five (5) months, the First Respondent failed to pay the said moneys. The vehicle would belong to him as he had all the documents of title. It is at this stage that the First Respondent complained to the Police at Mariakani Police Station that the Petitioner had conned him of the motor vehicle by use of tricks, and hence he needed assistance from the Police to trace and recover his vehicle.

8. According to the Replying Affidavit of the third Respondent, Adan Ali, sworn and filed on 11<sup>th</sup> March, 2015, he was summoned to the Office of OCS Mariakani Police Station where he was informed that, there was a person called Juma Rama Dziwe who had told the Police that his motor vehicle had been taken from him "by use of tricks" and needed the assistance of the Police. He met the complainant at the OCS's office where the OCS tasked him along with a colleague called Mutua to trace the motor vehicle.

9. In the course of the report at the OCS office, the complainant who is the First Respondent herein informed him that the vehicle had developed mechanical problems, and that he had approached the Petitioner who informed him that he was a money lender, and that the Petitioner had taken advantage of his situation and had taken and converted the motor vehicle to his own use, and never gave the First Respondent any money from the daily fares or collections.

10. Armed with that information, the Third Respondent and his colleague Mutua traced the motor

vehicle to Mazeras Township and found the Petitioner in possession thereof. As the motor vehicle had mechanical problems according to the Petitioner, it was pushed to Mazeras AP Camp while investigations continued.

11. Though the Petitioner claimed that he had advanced a huge sum of money, the Third Respondent had also established that where the Petitioner advanced a sum of say Kshs. 5,000/= he would alter the figure by adding a zero at the end, and make the sum advanced to Kshs. 50,000/= and where he advanced a sum of Kshs. 10,000/= he would add another zero (0) to make the sum of Kshs. 100,000/=. In that manner whoever was lent the small sum would never be able to pay the tenfold increases of the original sum advanced.

12. The Third Respondent claims he charged the First Respondent with obtaining money by false pretences in Mariakani Police file No. 314/182/2012, and that the file was transferred to Kaloleni, when the magistrate at Mariakani Law Courts declined to deal with it. Neither the Petitioner nor the Third Respondent exhibited the charge sheet, and this court was unable to ascertain whether it was the complainant Rama Dziwe, or the Petitioner who was charged with obtaining money by false pretences. The case was however withdrawn under Section 87 (a) of the Criminal Procedure Code, (Cap 75, Laws of Kenya), as the Petitioner declined to give evidence; and he was subsequently instructed to hand over the investigations file and the subject motor vehicle to the Deputy OCPD, where he later learnt the file was taken to the PCIO's office. He also learnt later that the motor vehicle was released by the OCPD to the First Respondent who was the registered owner thereof. The Third Respondent concluded that the Petition is scandalous, frivolous and vexatious, and that it has no basis, and should be dismissed with costs.

### **ANALYSIS AND CONCLUSION**

13. The primary duty of the Police service established under the Constitution of Kenya 2010 (Articles 243 and 244), is to strive for the highest standards of professionalism and discipline among its members, prevent corruption and practice transparency. Under the National Police Service Act, it's to detect, deter and prevent the occurrence of crime. It is the role of the Police to carry out investigations once a complaint is made to them, and take remedial action as their investigations reveal. The Police Service is enjoined under Article 244 to comply with Constitutional practices and human rights and fundamental freedoms.

14. The Petitioner has not shown how his rights under Articles 19 (rights and fundamental freedoms), 20 (application of the Bill of Rights), 21 (implementation of the rights and fundamental freedoms), 22 (enforcement of the Bill of Rights), 23 (the authority of courts to uphold and enforce the Bill of Rights), 25 (fundamental rights and freedoms which may not be limited), 27 (equality and freedom from discrimination), 28 (human dignity), 29 (freedom and security of the person), 31 (privacy), 33 (freedom of expression), 40 (protection of right to property), 47 (the right to fair administrative action), 48 (access to justice), 50 (the right to fair hearings, 51 (right of person detained, held in custody or imprisoned), 73 (leadership and integrity), 75 (conduct of state officers), 159(2) (the principles by which courts will be guided in exercise of their jurisdiction) and 165(3) (the high court has unlimited original jurisdiction in criminal and civil matters, and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened).

15. The Attorney-General on behalf of the four Respondents has contended that the Petition herein is frivolous, scandalous, and vexatious. What do these terms mean? These terms describe a proceeding which has little or no basis in law, the effect of which whatever its intention, is to subject the Defendant to inconvenience, harassment and expense out of all proportion to any likely gain to the claimant, which involves the abuse of the court's process that is to say, using that process for a purpose or a manner significantly different from its ordinary and proper use.

16. The Petitioner's claim (if any), lies with the First Respondent, Rama Dziwe Juma to whom he lent (if at all), some money. He was the person whom the Police through the OCPD Mariakani Police Division established was the owner of the subject motor vehicle. He was granted access to it and took it

away. It is an abuse of the Constitutional Court's process to claim a non-existent right under Article 40 of the Constitution, and it is treating the court process with disdain to make spurious claims against the Police for investigating complaints and resolving them.

17. It is abuse of the court's process to treat courts as some form of lottery where a litigant and their counsel throw some dice in the form of a Petition, and hoola, hope to win a jackpot of special, exemplary, punitive and general damages as compensation for investigating and closing their investigations.

18. Ordinarily, this court would direct that each party bears its own costs at the determination of a Petition on a matter of public interest, and affecting the fundamental rights and freedoms of the citizen. In this instance, the Petition is dismissed with a direction that the Petitioner do pay to the Attorney-General the sum of Kshs. 50,000/= to be gifted by the Attorney-General to Children Home in Mombasa County.

19. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 3<sup>rd</sup> day of June, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Mr. Shimaka for Petitioner

Miss Kili holding brief Miss Namahya for Respondent

Court Assistant Kaunda