



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 78 OF 2014

**IN THE MATTER OF: ARTICLES 1, 2, 3, 40, 47 AND 159 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF: THE VIOLATION OF THE RIGHT TO PROPERTY UNDER
ARTICLES 40 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: VIOLATION OF SECTIONS 24 AND 49 OF THE NATIONAL
POLICE SERVICE ACT NO. 11A OF 2011**

BETWEEN

SALIM ALI AMRAN.....PETITIONER

VERSUS

- 1. THE OFFICER COMMANDING POLICE DIVISION KISAUNI**
- 2. THE COUNTY POLICE COMMANDER MOMBASA**
- 3. THE INSPECTOR GENERAL OF POLICE**
- 4. THE ATTORNEY-GENERAL**
- 5. JAMILA a.k.a. ROSE MWIKALI MUINDI.....RESPONDENTS**

JUDGMENT

1. The Petition herein is dated 15th December, 2014 and is purported to be brought under the provisions of Articles 40, 47, 48, 22 and 15 of the Constitution of Kenya 2010 (the Constitution) as well as sections 24 of the National Police Service Act 2011 (No. 11A of 2011).

THE FACTS

2. The Petitioner and the 5th Respondent were husband and wife whose marriage fell into rocks, and is in

the process of dissolution before the Kadhi Court as the marriage was solemnized under Islamic law. The dispute, the subject of the Petition, is the ownership of a motor vehicle Registration Number KBN 777C, Toyota Station Wagon, popularly referred to as a Prado (the Vehicle). The Petitioner claims to have bought the vehicle on 10th November, 2010 before he married the 5th Respondent on 12th April, 2011 under Islamic law as already stated.

3. The Petitioner claims that sometime in the year 2012, the log book to the vehicle disappeared from the matrimonial home, prompting the Petitioner to report its loss to the First Respondent's Police Station where he was issued with an Abstract Report indicating the loss of the log book. It however emerged later that the wife, the 5th Respondent had taken (the Petitioner says "stolen") the log book and had fraudulently transferred it into her own name.

4. On or about 22nd August, 2014, the Fifth Respondent filed for divorce before the Kadhi's Court, claiming ownership of the vehicle among other properties. Thus begun the push and pull between the Petitioner and the Fifth Respondent over who should have possession of the vehicle. Initially the 5th Respondent obtained orders from the Kadhi's Court for possession of the vehicle and the orders were executed with the assistance of officers from Kisauni Police station. The Petitioner however moved to the Kadhi's Court and had the orders granting possession of the vehicle to the First Respondent set aside, and obtained possession of the vehicle.

5. However, the Fifth Respondent did not give up her claim to the vehicle, and it appears the vehicle was, at the instigation the Fifth Respondent detained at various Police Stations on three separate occasions. The Petitioner too was arrested on 19th September, 2014, at Central Police Station, on 23rd September, 2014, he was arrested at Urban Police Station, and on 26th September, 2014 the vehicle was detained at Bamburi Police Station by the OCPD Kisauni, hence his being joined as First Respondent. The vehicle was thereafter handed over to the Fifth Respondent by the OCPD Kisauni, without further reference to the Petitioner. The Petitioner's written protests to the Director of Public Prosecutions, the Ombudsman and the National Police Service Commission bore no fruit. In the circumstances, and feeling extremely aggrieved by the treatment received at the hands of the Respondents, the Petitioner seeks the following orders in his Petition -

(a) a declaration that the First, Second and Third Respondents' actions in seizing the petitioner's car are **ultra vires** the National Police Service Act and the Constitution and are therefore illegal and unconstitutional;

(b) declaration that the Petitioner's rights have been infringed by acts and/or omissions on the part of the Respondents and/or some of the Respondents;

(c) a declaration that the Petitioner be given back the car in its proper condition as at the time it was seized together with all the Petitioner's belongings that were seized in the car;

(d) a declaration that in the event of failure by the Respondents to comply with prayer (c) above within 7 days from the date of the order the Respondents and the Government of Kenya shall be jointly and severally liable to compensate the Petitioner for the market value of the car and the Petitioner's valuables therein;

(e) an order for the payment of damages and compensation for the unlawful seizure of property;

(f) any other relief that the court may deem fit;

(g) Costs of the Petition.

THE PETITIONER'S CASE

6. The thrust of the Petitioner's case lies in the claim that the First Respondent (the OCPD Kisauni)

purportedly acting on behalf of the Second and Third Respondents wrongfully assumed the role of prosecutor and judge by allegedly confiscating the vehicle and purporting to hand it over to the Fifth Respondent notwithstanding the fact that there was no evidence of a complaint made against the Petitioner.

7. **Secondly**, the Petitioner claims that the conduct of the First Respondent amounts to a gross abuse of his powers, especially because the issue of ownership of the motor vehicle is pending before the Kadhi's Court, Civil Case No. 198 of 2014. **Thirdly**, the Petitioner argued, the First, Second and Third Respondents lack the power to determine the issue of ownership of property between individuals, thus their actions were arbitrary, malicious, capricious and devoid of any justifiable reasons. **Fourthly**, the Petitioner argued, the First, Second and Third Respondents breached the petitioner's constitutional rights under the watchful eye of the Fourth Respondent, who, the Petitioner claims, failed to properly advise them. **Fifthly**, the Petitioner argued, the Fifth Respondent's failure to allow the law to take its course, and to determine her claim to the vehicle was clear indication that she is a key player in the illegal scheme to rob the Petitioner of his property, and for which she is therefore culpable. For all those reasons, the Petitioner urged the court to allow the Petition and grant the orders sought therein.

THE RESPONSES TO THE PETITION

8. The Response to the Petition comprised **firstly** of the Replying Affidavit of Richard Ngatia, the OCPD Kisauni, sworn on 25th September, 2014, and **secondly**, of the Replying Affidavit of the Fifth Respondent sworn on 26th March, 2015.

9. In his Replying Affidavit aforesaid, the OCPD Kisauni deponed inter alia, that the Petitioner and the Fifth Respondent were referred to him on 25th September, 2014 by the OCS Bamburi Police Station following a dispute over the ownership of the vehicle. The Petitioner accused the Fifth Respondent of fraudulently transferring the logbook from his name to her own. The Petitioner was advised by the Second Respondent to make a formal complaint about the theft and asked both parties to record a statement.

10. The Divisional Criminal Investigation Officer (DCIO) Kisauni was asked to assign an officer to the case, while the vehicle was detained. Four days later the Fifth Respondent came back to the Station for the car. The Respondents say that since a formal complaint that the logbook had been stolen was not made by the Petitioner, and that since the Fifth Respondent had a registration certificate for the vehicle, it was released to her. The Investigating Officer, PC Edward Kabacia conducted investigations, after which the First, Second and Third Respondents concluded that the Petitioner had given false information to the Police about the theft of the logbook of the vehicle. The First Respondent averred that he did not have any personal interest in the matter and the decision made by his office was neither biased nor mischievous.

11. On her part, Jamila Rose Mwikali Muindi, the Fifth Respondent, swore an Affidavit on 26th March, 2015 in response to the Petition stating that the Petitioner had purchased the vehicle on her behalf, using funds wired by the Fifth Respondent from Switzerland where she was working. The motor vehicle was registered in the Petitioner's name because she was not in the country at the time. However, later on, the Petitioner did transfer the vehicle into her name. Following filing of divorce proceedings, the Fifth Respondent proceeded to claim the vehicle from the Petitioner.

12. The Fifth Respondent made a complaint to the First Respondent, including the OCPD Urban and the Officer Commanding Station (OCS) Bamburi Police Station for the return of the vehicle, which the Petitioner was using as a hire vehicle, that the vehicle was in her name, as evidenced by a copy of records search from the Kenya Revenue Authority (KRA), as at 29th August, 2014 and annexed to her affidavit.

13. The Fifth Respondent consequently averred that the Petition is ill-advised and unmerited, since the issue of ownership of the vehicle was the subject of matrimonial proceedings before the Kadhi's Court. In addition, the Fifth Respondent averred that the Petition was lacking in pure issues of contravention of constitutional rights and liberties and instead incorporates issues of ownership or possession and wrongful detention of the vehicle which are subject of the matrimonial proceedings.

14. The petition was faulted by the Respondents for including parties against whom no conclusive orders can issue under the auspices of a pure question of contravention of constitutional rights and liberties, the petition should fail for the reason that it is at odds with the evidence in support thereof.

ANALYSIS OF THE SUBMISSIONS AND DETERMINATION

15. The first issue to be considered is whether there exists a constitutional issue for determination in this case. The Petitioner's case is that the First through the Third Respondents have violated his rights by illegally arresting him, detaining his motor vehicle and thereafter releasing it to his estranged wife (the Fifth Respondent), with whom the Petitioner contests for ownership of the vehicle.

16. The Petitioner's complaint in essence is that he was harassed by officers from Central Police Station, Urban Police Station, Kisauni Police Station (Dog Section) and Bamburi Police Station. Prima facie, it looks odd, and prejudicial that a suspect or accused person be subjected to arrest, questioning and attendant process in three Police Stations over a short period of time, over the same issue, and the Petition has to that extent a legitimate complaint, but does it amount to a violation of any constitutional right of the Petitioner. I do not think so.

17. The Fifth Respondent made complaints at various Police Stations. The First Respondent took over the handling of the dispute and asked both the Petitioner and Fifth Respondent to record statements. It is noteworthy that the complaint made to the Kisauni Police (Dog Section) emanated from the Petitioner as indicated in paragraph 15 (Exhibit 8 of the Petition) and indicated in a letter by the Petitioner's counsel dated 26th September, 2014 to the Director of Public Prosecutions after the motor vehicle was handed over to the Fifth Respondent.

18. From the statements recorded as averred in the Replying Affidavit of the First Respondent, the Police dropped the charges against the Petitioner and subsequently halted the investigations into his allegations against the Fifth Respondent, before a witness who also recorded a statement with the Police on 23rd December, 2014. From the statements recorded the Police dropped the charges against the Petitioner, and later on halted investigations into his allegations against the Fifth Respondent for forgery when they concluded that the Petitioner had transferred the logbook to her willingly.

19. The Police Service is charged with various duties as set out in Section 24 of the National Police Service Act. For this reason, the Police are not only bound to receive complaints when made to them, but are equally bound to investigate such complaints.

20. It is not in dispute that both the petitioner as well as the Fifth Respondent made claims against each other over the ownership of the motor vehicle. The First through the third Respondents in an effort to serve each of them and to preserve the peace detained the motor vehicle and requested the Petitioner to make a formal complaint before they could proceed with their investigations. Owing to the Petitioner's delay and failure to make a formal complaint, the Fifth Respondent, the Petitioner's wife, the registered owner of the motor vehicle and the vehicle was released to her. This is confirmed by the Petitioner's own counsel's letter to the Fourth Respondent –

“The OCPD Kisauni has since informed our Client that he intends to hand over the Vehicle to the said Jamila...”

21. The Petitioner however failed to make his complaint as required by the Police, and by the time he did so, a day later, the Police had already released the motor vehicle to the Fifth Respondent. The Police had in the course of their investigations established among other things that the Petitioner had not only willingly transferred the motor vehicle to the Fifth Respondent but that the Petitioner had also given false information to the Police, and therefore stopped carrying further investigations on the conflicting claims between the Petitioner and the Fifth Respondent.

22. The Petition herein is premised upon the provisions of Article 40 (the right to property), 47 (the right to fair administrative action), 48 (access to justice), 22 (the right of every person to institute court

proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

23. The right to ownership which the Petitioner claims to have been infringed is to the motor vehicle, which the Police after investigations handed over to the Fifth Respondent, his estranged wife with whom he had pending divorce proceedings before the Kadhi's Court. The question is whether the Police by handing over the motor vehicle, the subject of the dispute between the Petitioner and the Fifth Respondent violated any right to property of the Petitioner, or by acting unfairly under Article 47 of the Constitution or denied the Petitioner access to justice under Article 48 of the constitution?

24. Firstly, no right of the Petitioner has been violated or infringed, or threatened under Article 22 of the Constitution as read together with Article 48 (access to justice) as the Petitioner has been to court and heard, hence this Ruling. **Secondly**, the Petitioner cannot be heard to say that he has been denied fair administrative action. He made his complaint against the Fifth Respondent that he had forged the documents for the transfer of the motor vehicle to herself. The Petitioner was unable to make a formal complaint and supply particulars of the alleged forgery and circumstances thereof.

25. Article 40 confers upon every person the right either individually or in association with others, to acquire and own property of any description, and Article 40 (3) prohibits the state from depriving a person of property of any description, or of any interest in, or right over, property of any description.

26. The Petitioner **firstly** failed to establish that the state deprived him of the motor vehicle. **Secondly**, he failed to establish that the motor vehicle belonged to him or it was his. He had no document of title. **Thirdly**, the essence for the documents produced show that the motor vehicle belonged to the Fifth Respondent both in law and beneficially in equity as the person who put up the funds for the purchase of the vehicle. The handing over of the motor vehicle by the Police to the Fifth Respondent (the registered owner), did not, and does not amount to taking away or depriving the Petitioner of **"his"** property. The claim to the contrary has no basis. Equally there is no basis for claims under Articles 47 and 48 of the Constitution. The Petitioner was given a fair hearing in this Petition, and when he made his complaint against the Fifth Respondent, and there is consequently no breach of either Article 47 or 48 of the Constitution.

27. In the premises therefore the Petition herein has no limbs to stand upon, and therefore fails, and is dismissed with costs to the Respondents.

28. I also direct that the motor vehicle (which was detained pending the determination of the Petition herein) be released forthwith to the Fifth Respondent, pending any further orders from the Kadhi's Court in Kadhi's Court Civil Case No. 198 of 2014, on the determination of the division of matrimonial property under Islamic law, between the Petitioner and the Fifth Respondent.

29. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 17th day of July, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Mutubia for Petitioner

Miss Ombat holding brief Mutiso for Fifth Respondent

Miss Obat holding brief Kiti for 4th Respondent

Mr. Kaunda Court Assistant