

**IN THE COURT OF APPEAL
AT NAIROBI**

**(CORAM: MUSINGA (P), GATEMBU & JOEL NGUGI,
JJ.A.) CIVIL APPEAL NO. 473 OF 2019**

BETWEEN

ANTI-COUNTERFEIT AUTHORITY.....APPELLANT

AND

FRANCIS JOHN WANYANGE.....1ST

RESPONDENT ROBERT PAUL GACHOKA WANYANGE 2ND

RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD

RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH

RESPONDENT THE OCS INDUSTRIAL AREA

POLICE STATION.....5TH RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Majanja, J.) dated 23rd November, 2018

in

Petition No. 320 of 2015)

JUDGMENT OF THE COURT

A. Background

1. This is an appeal from the judgment of the High Court (Majanja, J.) delivered on 23rd November, 2018 in ***Petition No. 320 of 2015***. The Petitioners in the case, now the 1st and 2nd respondents, challenged the seizure and detention of their motor vehicle Toyota Hilux KBM 766B and 82 assorted gas cylinders by the appellant herein, the Anti- Counterfeit Authority (hereinafter, “ACA” or “appellant”).
2. The 2nd respondent, who was in possession of the vehicle and

cylinders, was arrested and briefly detained but later released on cash bail. No charges were brought against him by ACA. Instead, the Energy Regulatory Commission (ERC, now EPRA) instituted charges in

Makadara Criminal Case No. 5259 of 2015. That prosecution collapsed for want of prosecution and was dismissed under section 206 of the Criminal Procedure Code (CPC), resulting in an acquittal.

3. The respondents alleged that the seizure and prolonged detention of the goods caused economic loss and violated their rights under Articles 40 and 47 of the Constitution. They sought declarations, release of the goods, damages, and other reliefs.

B. Summary of the Trial and High Court Judgment

4. It was common between the parties that on 9th July 2015, ACA officers impounded the respondents' Toyota Hilux KBM 766B and 82 gas cylinders, and arrested the 2nd respondent, who was later released on bail but never charged under the Anti-Counterfeit Act.
5. The respondents argued that the seizure and indefinite detention violated their rights to property (Article 40 of the Constitution), to fair administrative action (Article 47 of the Constitution), to due process, and to earn a livelihood. They claimed they were losing approximately Kshs. 15,000 per day in income from the detention.
6. At the interlocutory stage, the parties recorded a consent before Lenaola, J. (*as he then was*) on 14th August 2015, securing the release of the motor vehicle to the 1st respondent upon conditions. However, the 82 cylinders remained detained.
7. The ACA did not file any replying affidavit to rebut the respondents' averments. The court, therefore, treated the factual assertions as uncontroverted. The learned Judge, however, permitted counsel for ACA to orally address the court on matters of law.
8. In its oral submissions, ACA contended that the Petition did not meet the precision threshold under **Anarita Karimi Njeru v**

Republic

[1979] KLR 154, and that the respondents lacked proprietary rights in the cylinders as they were not licensed cylinder owners under the Energy (Liquefied Petroleum Gas) Regulations, 2009.

9. The High Court rejected these arguments. It held that the Petition was sufficiently precise as it identified the impugned actions and linked them to rights violations under Articles 40 and 47 of the Constitution.
10. On ACA's statutory mandate, the learned Judge noted that sections 23 and 28 of the Anti-Counterfeit Act empower seizure only on reasonable suspicion of counterfeiting, and require goods seized to be released within three months unless charges are laid. ACA had not demonstrated reasonable suspicion nor initiated prosecution under the Act.
11. The Court emphasised that ACA had not presented any complaint by a brand owner or any evidence to suggest the cylinders were counterfeit.
12. On damages, the court found that special damages were not specifically pleaded and proved, but that general damages could be awarded for the violation of constitutional rights. It awarded Kshs. 500,000 to vindicate those rights, plus costs.
13. The Court, therefore: (i) declared that the respondents' rights to property had been violated; (ii) ordered the release of the logbook and cylinders; (iii) awarded Kshs. 500,000 general damages; and (iv) awarded Kshs. 50,000 costs against ACA.

C. Grounds of Appeal

14. ACA was aggrieved by the High Court judgment. Its Memorandum of Appeal raised the following grounds, reproduced *verbatim*:

- 1) ***The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong and erroneous decision in failing to appreciate, find and hold that the Respondents did not have any property rights in the 82 gas cylinders.***
- 2) ***The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision by failing to appreciate, find and hold that Respondents could only have property rights in the 82 gas cylinders if they had an appropriate licence from the then Energy Regulatory Commission.***
- 3) ***The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision in failing to appreciate, find and hold that the Respondents having lacked an appropriate licence were engaged in an illegality and consequently were undeserving of the prayers sought in the Petition.***
- 4) ***The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision failing to appreciate, find and hold that the entire Petition was fatally defective and incurably incompetent and could not be the basis of the grant of any prayers.***
- 5) ***The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision by failing to appreciate, find and hold that there was no evidence to support the allegations on unconstitutionality against the Appellant in the Petition and consequently no orders could be granted against the Appellant.***
- 6) ***The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision by failing to allow the Appellant to rely on a Replying Affidavit and written submissions that had been filed on the hearing date in the morning and consequently violated the Appellant's guaranteed fair trial rights.***

7) The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision in failing to

appreciate, find and hold that the seizure of the 82 gas cylinders was a consequence of collaboration with other law enforcement agencies which is consistent with the statutory mandate of the Appellant under Section 5 of the Anti-Counterfeit Act and consequently it was erroneous to hold the Appellant wholly liable.

- 8) The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision in failing to appreciate, find and hold that the Respondents being engaged in illegal activity could not seek benefit by way of monetary compensation from any Court of law of competent jurisdiction.**
- 9) The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong decision in failing to appreciate, find and hold that the 82 gas cylinders could not be released to the Respondents who lacked the requisite licence as that would be tantamount to aiding an illegality.**
- 10) The Learned Honourable Judge erred in law and in fact and thereby misdirected himself and arrived at an erroneous decision in applying wrong principles and test in deciding on the Petition.**
- 11) The Learned Honourable Judge erred in law and in fact and thereby arrived at a wrong and erroneous decision in failing to appreciate, find and hold that the absence of Energy Regulatory Commission from proceedings on whose behalf the Appellant was holding the 82 gas cylinders within the context of multi-agency collaboration and that preferred criminal charges against the Respondents prejudiced the fair trial rights of the Appellant.**

D. Appellant's Submissions

15. The appellant submitted that the respondents lacked standing to bring the petition as they were not licensed cylinder owners. Citing

regulation

2 of the Energy (LPG) Regulations, 2009, ACA emphasised that
a

“cylinder or brand owner” is a licensed person who introduces cylinders into the market. ACA argued that the respondents, by their own pleadings, admitted they were in the business of transporting and selling LPG but produced no licences. Transport and retail of LPG requires licences under regulations 4, 11, 12, and 13 of the Energy (LPG) Regulations. The appellant argued that by failing to produce any licences, the respondents demonstrated that they were engaged in illegality.

16. ACA further argued that possession of cylinders belonging to other brand owners without licences created a rebuttable presumption that the respondents had no property rights in them. The High Court, it was submitted, erred by shifting the burden to ACA instead of requiring the respondents to prove ownership.
17. On adequacy of pleading, ACA argued that the Petition did not meet the precision test in **Anarita Karimi Njeru** because it did not specify which provisions of the Constitution were violated or how. General references to rights without factual linkage, it was contended, were insufficient.
18. ACA also submitted that the Petition was unsupported by evidence. Rule 11 of the 2013 Mutunga Rules requires petitions to be supported by affidavits with annexed documents. According to ACA, the verifying affidavit filed by the 1st respondent contained no proof of ownership of the cylinders or of loss of income.
19. On fair hearing, ACA complained that the High Court denied it a right to file and rely on a replying affidavit that it had sought to place on record on the day of the hearing. This, it argued, diminished its right to be heard under Article 50 of the Constitution.

20.ACA also pointed to the multi-agency nature of the enforcement exercise which resulted in the goods claimed by the respondents and contended that the exercise involved the Energy Regulatory Commission (ERC) and the police. The non-joinder of ERC and the Attorney General, it contended, rendered the Petition fatally defective.

21.On relief, ACA submitted that the award of damages was unjustified since no violation of rights had been proved, and in any case, no evidence supported quantification of damages.

22.ACA, therefore, urged this Court to allow the appeal, set aside the judgment of the High Court, and dismiss the Petition with costs.

E. Respondents' Submissions

23.The respondents submitted that ACA filed no affidavit evidence in the High Court. Their averments therefore stood unchallenged. Under section 107 of the Evidence Act, the burden lay on ACA to justify its seizure and continued detention, and having failed to tender any evidence, its claims remained bare allegations.

24.They argued that section 23 of the Anti-Counterfeit Act requires seizure to be based on reasonable suspicion of counterfeiting, and section 28(1) requires release within three months absent prosecution. The respondents submitted that ACA met neither threshold. The seizure was thus arbitrary and unlawful.

25.On proprietary interest, the respondents argued that they did not need to prove they were licensed brand owners to assert their right against unlawful detention. They urged that possessory interests, coupled with their status as business operators, sufficed to ground Article 40 protection. They insisted that the question of licensing

was a regulatory matter for ERC, not ACA.

26. The respondents emphasised that ACA conflated licensing issues with counterfeit enforcement. If the concern was lack of ERC licensing, that was ERC's domain and could not justify ACA's indefinite detention of the seized goods.
27. On pleading precision, the respondents maintained that their Petition clearly identified the impugned acts — seizure and continued detention — and linked them to Articles 40 and 47. This, they contended, met the ***Mumo Matemu v Trusted Society [2013] eKLR*** standard set by this Court.
28. They further pointed out that the criminal case instituted by ERC was abandoned after repeated non-attendance. The 2nd respondent was acquitted under section 206 CPC. They urged that, therefore, the continued detention of cylinders after acquittal had no legal basis.
29. On damages, the respondents relied on the principle that constitutional damages vindicate rights, not merely compensate loss. According to them the award of Kshs. 500,000 was modest, considering that the detention had lasted years and destroyed their livelihood.
30. They added that ACA had acted with impunity, ignoring court orders including the consent of 14th August, 2015. They urged that the Court should uphold the High Court's findings to mark disapproval of such conduct.
31. The respondents, therefore, urged dismissal of the appeal with costs.

F. Standard of Review and Issues for Determination

32. This being a first appeal, the duty of this Court is well settled. In ***Selle & Another v Associated Motor Boat Co. Ltd. [1968] EA 123***, the Court held that an appeal to the Court of Appeal from the High Court is by way of retrial, and the appellate court must reconsider the

evidence, evaluate it, and draw its own conclusions, though bearing in mind that it has neither seen nor heard the witnesses.

33. Similarly, in ***Jabane v Olenja [1986] KLR 661***, this Court stated that it will not lightly differ from the findings of a trial judge on issues of fact unless satisfied that the learned Judge misapprehended the evidence, drew wrong inferences, or reached conclusions not supported by the evidence.

34. The appeal was canvassed by way of written submissions and oral highlights. During the plenary hearing on 23rd June, 2025, Mr. Adera, learned counsel, together with Ms. Munguti, appeared for the appellant while Mr. Njuguna, learned counsel, appeared for the respondents.

35. Having carefully reviewed the record of appeal, the submissions of counsel – both written and oral, and the law, and mindful of the appellate standard of review set in ***Selle v Associated Motor Boat Co. [1968] EA 123*** and ***Jabane v Olenja [1986] KLR 661***, we consider that this appeal raises the following issues for determination:

- i. ***Precision of Constitutional Petitions:*** Whether the petition as framed before the High Court satisfied the constitutional pleading threshold laid down in ***Anarita Karimi Njeru v Republic [1979] eKLR*** and clarified by this Court in ***Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR***.
- ii. ***Exhaustion of Remedies:*** Whether the petition was premature for failure to exhaust alternative remedies under the Anti-Counterfeit Act, and whether such an objection can be competently raised for the first time

on appeal.

- iii. **Fair Hearing and Non-Joinder:** Whether the refusal by the High Court to admit a late-filed replying affidavit, and the non-joinder of other regulatory agencies, rendered the proceedings unfair or fatally defective.
- iv. **Proprietary Interest and Licensing:** Whether the respondents demonstrated a sufficient proprietary interest in the 82 gas cylinders to sustain a claim for their release, including whether the absence of licences under the Energy (Liquefied Petroleum Gas) Regulations, 2009 disentitled them to protection, and whether the appellant's rebuttable presumption argument has merit.
- v. **Lawfulness of ACA's Actions:** Whether the actions of the Anti-Counterfeit Authority in seizing and detaining the motor vehicle and 82 gas cylinders were lawful under the Anti-Counterfeit Act, particularly Sections 23 and 28(1) thereof.
- vi. **Reliefs Granted:** Whether the High Court properly exercised its discretion in granting declaratory reliefs, orders for release of the property, and an award of damages.

36. We will analyze each of these issues in turn.

G. Analysis and Determination

i. Precision of the Constitutional Petition

37. The first issue concerns the competence of the Petition. ACA contended that the Petition failed to meet the standard in **Anarita**

***Karimi Njeru v Republic* [1979] KLR 154**, as it did not plead with precision the

provisions of the Constitution alleged to have been violated or the manner of violation.

38. The High Court held otherwise, and so do we. In doing so, we reiterate that while **Anarita Karimi Njeru** remains good law, the standard has been recalibrated under the 2010 Constitution. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, this Court explained:

“The principle in Anarita Karimi Njeru (supra) is not a technical requirement of form. It is a substantive requirement intended to ensure that parties understand the case they have to meet and the court is properly guided. What is required is reasonable precision in framing complaints, not perfect particularity. A petition should disclose the specific constitutional provisions alleged to be infringed, the manner of infringement, and the nature of the redress sought. The test is one of substance, not of formula....We cannot look at Article 22 in isolation. We agree with the High Court that precision is not coterminous with exactitude. It is not a ritualistic requirement. The principle in Anarita Karimi Njeru that requires reasonable precision in framing issues is to ensure that the Respondent has adequate notice and that the court is able to fashion an appropriate remedy. The standard is one of reasonable specificity, not mechanical nicety.”

39. In the present case, the Petition identified the impounding and indefinite detention of the Toyota Hilux motor vehicle and 82 gas cylinders as violations of the right to property (Article 40 of the Constitution); the right to fair administrative action (Article 47 of the Constitution), and the right to earn a livelihood (Article 43 of the Constitution). These allegations were sufficiently clear to alert ACA and the other respondents of the case to meet, and to allow the High Court to craft appropriate remedies. The challenge on this

ground, thus, fails.

(ii) Exhaustion of Statutory Remedies

40. ACA next invoked the doctrine of exhaustion, arguing that the respondents should have proceeded under section 25(3) of the Anti-Counterfeit Act to seek a determination that the seized goods were not counterfeit.
41. The doctrine of exhaustion is important, but it is not absolute. This Court has held that where constitutional violations are systemic or where effective remedies lie beyond the remit of statutory mechanisms, constitutional petitions may proceed. See ***Speaker of the National Assembly v Njenga Karume [1992] eKLR; Geoffrey Muthinja Kabiru & 2 Others v Samuel Henry Muturi & 1756 Others [2015] eKLR; William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others [2020] eKLR.***
42. We note, first, that the issue of exhaustion was never raised at the High Court. The point cannot, without more, be raised for the first time on appeal where no factual record exists. The Court of Appeal recently emphasized this in ***Philip Otiende Adundo v County Assembly Service Board of Kisumu County & 5 Others (Civil Appeal No. 258 of 2019) [2025] KECA 239 (KLR):***

“While it is a sound principle of law that jurisdictional questions can be raised at any time in proceedings even for the first time on appeal... it is different where the jurisdictional question is pegged on the doctrine of exhaustion. This is because the doctrine of exhaustion bereaves a court of jurisdiction only by preclusion: that the court is precluded from considering the dispute presented to it until the litigant has first pursued available statutory remedies outside the court. Consequently, the doctrine of exhaustion has known exceptions. It can also be waived or forfeited. The circumstances under which exhaustion requirements may be excepted, waived

or forfeited by the parties to a litigation are factual and require factual findings. This

is the reason the doctrine of exhaustion as a jurisdictional bar must be raised in the first instance at the trial court. A party cannot wait and raise it on appeal where the adversary cannot present factual material to demonstrate the non-applicability of the doctrine to the particular controversy before the court.”

43. Exhaustion was never pleaded at the High Court. More fundamentally, the Petition alleged arbitrary seizure, prolonged detention beyond the statutory three months in section 28(1) ACA, and violations of Articles 40 and 47. Such claims transcend the narrow remedy in section 25(3) and warranted constitutional redress. We conclude that the High Court, therefore, properly assumed jurisdiction.

(iii) Fair Hearing and Rejection of ACA's Affidavit

44. ACA complained that the High Court unfairly rejected its attempt to file a replying affidavit late, thereby violating its right to a fair hearing. The record shows that when the matter came for hearing, ACA had repeatedly failed to file pleadings despite directions. On the hearing date, it sought to place an affidavit on record without leave or explanation.

45. A litigant cannot disregard court directions, ignore timelines, and then claim violation of fair hearing when procedural defaults are enforced. Article 50 of the Constitution guarantees a fair trial, but fairness is to all parties, including the opposing litigant who is entitled to certainty and orderly procedure. The High Court, in allowing ACA's counsel to make oral submissions despite the absence of evidence, actually leaned in favour of fairness. ACA cannot now claim prejudice when the lack of evidence was of its own making.

(iv) Non-Joinder of Parties

46. ACA also faulted the High Court for determining the Petition whereas the Attorney General and the Energy Regulatory Commission (ERC) were not joined as parties, contending that the enforcement action was a multi-agency operation.
47. We find no merit in this complaint. First, ERC was not the seizing authority; ACA itself impounded the cylinders. Second, the Petition was framed as a rights-violation claim against ACA and other state actors directly involved in the seizure. Under Article 22 and rule 5 of the Mutunga Rules, the court may grant relief even against one violator. Non-joinder is not fatal where the impugned conduct of the named respondents is independently justiciable.
48. Indeed, ACA cannot escape accountability for its own statutory actions by pointing to the absence of other agencies. If it wished to join ERC or the Attorney General, it could have sought joinder at the High Court. Having failed to do so, it cannot raise the complaint on appeal.

(v) Proprietary Interest in the Cylinders and Licencing

49. ACA's most sustained argument was that the respondents had no proprietary interest in the 82 gas cylinders. Counsel relied on the Energy (Liquefied Petroleum Gas) Regulations, 2009, which define a "cylinder or brand owner" as *"a licensed person who has introduced cylinders into the market through his network of wholesalers or retailers, by purchasing or importing from a manufacturer or acquiring the cylinders or brand from another licensee."* It was urged that since the respondents did not plead or prove that they were licensed cylinder or brand owners, they could not claim property in the impugned cylinders.

50. Building on this statutory definition, ACA contended that there is a rebuttable presumption that persons found in possession of branded gas cylinders are not the owners, unless they demonstrate by licence or assignment that they are authorized by the brand owner. Counsel submitted that this presumption exists to protect consumers from counterfeit or unsafe cylinders in circulation, and to safeguard the intellectual property of brand owners. ACA went further to argue that a rebuttable presumption arises against persons in possession of branded cylinders unless they can prove authorization from brand owners. According to ACA, the respondents' failure to produce licences or written authority confirmed that they lacked ownership and were engaged in unlawful activity.

51. In our respectful view, this argument is overstated for two reasons. First, presumptions are evidentiary tools: they arise only when a basic fact is proved. For example, if ACA had adduced evidence that the cylinders bore the embossed marks of particular oil companies or brand owners, a presumption of lack of ownership might arise, shifting the evidential burden to the respondents to show that they were licensees. But here, ACA adduced no affidavit, no inventory, and no complaint from any brand owner to demonstrate that the seized cylinders were indeed the property of others. Without such proof, the presumption cannot even begin to operate. Differently put, a rebuttable presumption cannot arise in a vacuum. It is only triggered when the party relying on it adduces *prima facie* evidence establishing the foundational fact. Had ACA tendered affidavits, inventories, or reports showing that the seized cylinders bore embossed marks of oil companies, and that such companies had disclaimed ownership or authorization, the evidential burden would

have shifted. But ACA filed no affidavit, led no evidence, and did not produce a single complaint

from any brand owner. Without such material, no presumption could arise.

52. Second, possession of gas cylinders in the specific circumstances of this case – where they are linked to a commercial enterprise – is itself evidence of a proprietary interest which, absent contrary demonstration of illegality or unlawfulness or unless displaced by countervailing evidence, is protected under Article 40 of the Constitution. ACA’s failure to place any evidence on the record meant that the respondents’ claim of use and possession stood unrebutted. As the High Court correctly held, mere assertions from the bar that the cylinders “belonged to someone else” did not discharge ACA’s burden under section 107 of the Evidence Act.
53. ACA also attempted to invoke licensing requirements under the Energy Act, suggesting that lack of an ERC/EPRA licence disentitled the respondents from claiming the property. We disagree. ACA’s reliance on the licensing provisions of the Energy Regulations is misplaced in this context. The duty to produce or display licences is triggered only when a lawful demand is made by the appropriate regulator — in this case, the Energy Regulatory Commission (now EPRA). ACA did not show that any such demand was made. To hold otherwise would invert the burden of proof by requiring citizens to prove compliance with a statutory regime when the detaining authority has adduced no *prima facie* evidence of non-compliance.
54. Finally, the Anti-Counterfeit Act and the Energy Act serve distinct purposes. ACA’s jurisdiction is confined to counterfeit goods — goods that infringe intellectual property rights. It cannot stretch its mandate to enforce licensing infractions under another statute. As the respondents rightly argued, whether they held valid transport or retail

licences was a matter for ERC/EPRA, not ACA. The attempt to bootstrap licensing deficiencies into a justification for indefinite detention of property must, therefore, fail.

55. In sum, the rebuttable presumption theory fails for want of evidential foundation. ACA placed no material before the High Court to show that the cylinders were owned by third-party brand owners, that complaints had been made, or that the respondents were operating without licences. In that evidentiary void, the respondents' possession and use of the cylinders attracted constitutional protection, and the High Court was correct to order their release.

56. We, therefore, affirm the High Court's conclusion that ACA failed to establish any lawful basis for withholding the cylinders. The proprietary interest of the respondents was sufficiently established by possession, and ACA's reliance on a rebuttable presumption without evidential foundation must be rejected.

(vi) On the Lawfulness of the ACA's Actions

57. The appellant's position on this issue was that its inspectors were lawfully exercising their mandate under section 23 of the Anti-Counterfeit Act (ACA) when they seized the respondents' motor vehicle and the 82 gas cylinders. Counsel argued that the seizure was part of a legitimate multi-agency enforcement operation targeting unlawful trade in liquefied petroleum gas and that the respondents had not demonstrated lawful authority to deal in the cylinders. In its view, the respondents' recourse, if aggrieved, lay in invoking section 25(3) of the ACA to obtain a declaration that the goods were not counterfeit.

58. The respondents, on their part, contended that the ACA's actions

had no lawful basis whatsoever. They pointed out that ACA never produced any complaint, test, or evidence suggesting that either the gas

cylinders or their contents were counterfeit. Further, the criminal charges that were eventually brought against the 2nd respondent by the Energy Regulatory Commission related purely to licensing infractions under the Energy Act, not to counterfeiting. Finally, they argued that under section 28(1) of the ACA, detention of seized goods beyond three months in the absence of charges under the Act was plainly unlawful.

59. The ACA is a statutory body with powers strictly circumscribed by the Anti-Counterfeit Act. Under section 23, its inspectors may search and seize goods only where there are reasonable grounds to suspect that the goods are counterfeit. Section 28(1) further limits the period of detention of such seized goods to three months, unless within that period a person is charged with an offence under the Act in relation to the goods.

60. In the present case, the record discloses no evidence of any complaint, test, or report suggesting that the impounded gas cylinders or their contents were counterfeit. ACA produced no affidavit evidence to show the basis for its suspicion. The criminal proceedings that were eventually mounted by the Energy Regulatory Commission (ERC) at the Makadara Chief Magistrates' Court were grounded on licensing infractions under the Energy Act, not on allegations of counterfeiting. In substance, therefore, the impugned seizure was not connected to the statutory mandate of the ACA.

61. Even assuming *arguendo* that the initial seizure was within section 23, the ACA thereafter detained the respondents' property well beyond the statutory three-month window without preferring any charges under the ACA. By its plain terms, section 28(1) required the return of the goods within that period. Continued detention

absent charges

rendered the ACA's conduct *ultra vires*, unlawful, and in violation of Article 40 of the Constitution.

62. The High Court correctly identified this statutory violation. Its finding that the ACA's action lacked reasonable foundation, and that the prolonged detention could not be justified under the Act, was in accord with both the letter and the spirit of the law. On our own review of the record and the statute, we reach the same conclusion. The ACA not only failed to discharge its evidential burden but acted in derogation of the safeguards Parliament built into the ACA to prevent arbitrary deprivations of property.

(vii) Whether the Reliefs, Including Damages, Were Properly Granted

63. The final issue concerns the propriety of the reliefs granted by the learned Judge, in particular the declarations, the order of release, and the award of damages.

64. On declarations, we find no fault whatsoever. The respondents' property had been seized and detained for an extended period without any evidential basis or statutory justification. As already analysed, ACA neither established reasonable grounds for believing the goods were counterfeit under section 23 ACA, nor acted within the temporal confines of section 28(1). In those circumstances, declarations vindicating the respondents' constitutional rights under Articles 40 and 47 were appropriate.

65. The order of release of the cylinders and logbook followed logically from the declaration. The motor vehicle had, in fact, been released by consent, leaving the cylinders and logbook unjustifiably detained. Once the statutory period had expired and no charges had been brought

against the respondents, continued retention of the goods was unlawful.

66. The more contested relief is the award of damages. The High Court declined to award special damages for want of particularised pleading and proof. That decision was unimpeachable, consistent with ***Hahn v Singh [1985] KLR 716***, which affirmed that special damages must not only be specifically pleaded but strictly proved. Although the respondents had produced a financial report estimating loss of Kshs. 2,132,788.76, the pleadings only alleged loss of “not less than Kshs. 15,000 per day” without a breakdown. The learned Judge correctly held that this did not meet the evidentiary threshold.

67. However, the Court proceeded to award Kshs. 500,000 in general damages to vindicate the respondents’ constitutional rights. In our view, this was proper. General damages are awardable in constitutional litigation not to compensate commercial loss but to recognize and vindicate rights infringed. As this Court affirmed in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR***, the primary purpose of constitutional damages is not pecuniary enrichment but constitutional vindication.

68. The quantum, Kshs. 500,000, is, in the circumstances, modest, proportionate, and within the discretion of the learned trial Judge. It reflects the seriousness of arbitrary seizure and prolonged detention by a public authority, yet remains moderate in recognition that no special loss was proved. We find no basis to disturb the award.

69. In sum, the reliefs granted were measured and appropriate: declaratory and restitutionary relief to restore property rights,

coupled with a modest award of general damages to vindicate rights infringed. We, therefore, decline to interfere with them.

H. Disposition

70. In the result, the appeal is devoid of merit. We, accordingly, dismiss it in its entirety. The judgment and decree of the High Court (Majanja, J.) delivered on 23rd November, 2018 in Nairobi **Constitutional Petition No. 320 of 2015** are hereby upheld. The respondents shall have the costs of this appeal.

71. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of October, 2025.

D. K. MUSINGA, (PRESIDENT)

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**..... JUDGE OF
APPEAL**

S. GATEMBU KAIRU, C.Arb, FCIArb

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is
a true copy of the
original.

Signed
DEPUTY REGISTRAR