



**Kiura v Attorney General & 5 others (Civil Appeal 34 of 2018)
[2024] KECA 1054 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KECA 1054 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 34 OF 2018
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
FEBRUARY 2, 2024**

BETWEEN

RONALD NYAGA KIURA APPELLANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF
NATIONAL GOVERNMENT 2ND RESPONDENT**

EMBU COUNTY COMMISSIONER 3RD RESPONDENT

AMOS GATHECHA 4TH RESPONDENT

EMBU TRAFFIC BASE COMMANDER 5TH RESPONDENT

JOHN LUGALA 6TH RESPONDENT

*(Being an appeal against the decree and judgment of the High
Court at Embu (F. Muchemi, J.) dated 25th July 2016 in)*

JUDGMENT

1. The Constitution of Kenya has empowered Kenyans to be assertive in enforcing their legal and constitutional rights under the Bill of Rights in Chapter 4. It also creates obligations on public officers charged with the responsibility of managing public institutions, public affairs and public resources.



The people of Kenya have taken the right to manage their public affairs by asserting their sovereignty as provided under Article 22(1) of the *Constitution*, which states as:

“Every person has the right 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.”

2. Invoking the above Article, Ronald Nyaga Kiura, the appellant, moved the High Court at Embu vide his petition dated 9th March, 2016 seeking several reliefs. In the petition, the appellant described himself as a Kenyan residing and working for gain in Embu. He deposed that he was the beneficial owner of two motor vehicles-land-rovers registration numbers KAG 520G and KKK 870. He also averred that he is the owner of a building erected on LR Kagaari/Kangethia/T29 located at Ena Market within Embu County, all valued at Ksh.4,905,000. The land in question is, nonetheless, registered in the name of Aliet Mutitu Kiura (deceased).
3. According to the appellant, on or about the 15th July, 2015, the 5th and 6th respondents raided his home, assisted by some police officers and National Youth Service personnel and unlawfully demolished his house whereas his vehicles, above mentioned, were impounded and taken to the police station, resulting to loss of business at a rate of Ksh.260,000 per month from the 15th July, 2015 when the vehicles were towed away as he could not hire them out for transport business anymore. Further, that the house was still under construction, and it had cost him Ksh.4,905,000.00.
4. It was his case that his constitutional rights were violated by the respondents’ actions as follows:
 - i. The right to equal protection and equal benefit of the law in the manner his property was destroyed (Article 27(1)).
 - ii. He had been tortured psychologically by the brutal force into his property (Article 29(d)).
 - iii. His right not to have his home unlawfully searched and to have his property wrongly seized and a violation of his right to protection of property (Article 31,40).
 - iv. Violation of his right to fair administrative action for not being given an opportunity to be heard before the demolition of his house (Article 47).
 - v. His right to social security had been infringed on by denying him his livelihood reducing him to a man of straw and destitution.
 - vi. The respondents had failed to conduct themselves in accordance with the national values and principles of governance, the principles of leadership and integrity and the values and principles of public service (Article 10,73).

The appellant prayed for the reliefs as follows:

- a. A declaration that the 3rd, 4th, 5th and 6th respondents contravened the petitioner’s rights guaranteed under article 27(1), 29(d), 31(c) & (d), 40(1)(a) & (3) & (6), 43(1)(e) and 47(1) of the *Constitution*.
- b. A declaration that the 3rd, 4th, 5th and 6th respondents abrogated the Constitution by violating Article 3(1),10,73(2) and 232(1) of the *Constitution*.
- c. A declaration that the demolition of the petitioner’s residential house and seizure of motor vehicle KAC 520G and KKK 870 by the 3rd, 4th, 5th. and 6th respondents are null and void by virtue of Article 2(4) of the *Constitution*.



- d. An order that the 3rd, 4th, 5th and 6th respondents do compensate the petitioner in the sum of Ksh.10,000,000 for contravening his rights and fundamental freedoms.
 - e. An order that the 3rd and 4th respondents to refund the petitioner the sum of Ksh.4,905,000 being the actual cost of building.
 - f. An order that the 3rd and 4th respondents do meet the cost of removal and dumping of construction debris.
 - g. An order that the respondents do pay the petitioner interest on the above at the court rate of 14% until payment in full.
 - h. An order that the 3rd and 4th respondents indemnify the petitioner against any lawsuits by the County government or National Environment Management Authority or National Construction Authority or any other authority in respect of the derelict building.
5. The petition was strongly opposed by the respondents. Amos Gatheca, (the 4th respondent) the then Embu County Commissioner swore an affidavit on his own behalf and on behalf of the 1st, 2nd and 3rd respondents. The 5th respondent John Lugala, the Embu Traffic Base Commander swore the 2nd replying affidavit. The 4th respondent gave a lengthy history of the efforts by the National Government to fight illicit brew which was prevalent in the Country and the challenges encountered in the operations of its crackdown. This was after a host of deaths and serious health complications which were experienced in the Country at large leading to a crackdown on manufacturers and distributors of the illicit brew. Further that intelligence reports had identified the appellant as a major manufacturer and distributor of the stuff using his premises at Ena Market disguised as residential. Several operations to the compound had been carried out and 30,000 litres were seized and destroyed.
 6. In addition, he averred that the appellant's wife had been charged in Embu Criminal Court Case No. 980 of 2015 with selling 70 litres of illicit brew and that she had been released on Ksh.100,000 bond as per the charge sheet which was annexed to the affidavit. Further, that upon acting on further intelligence on the 15th July, 2015, the 3rd and 4th respondents raided the appellant's illegal business at Ena market assisted by police officers and National Youth Service personnel, however, the occupants fled, and 30,000 litres of the illicit brew was discovered upon them destroying where it had been stored.
 7. On the other hand, the 6th respondent averred that he had been instructed by the Officer Commanding the Police Division Embu West to go to Ena Market and join a team led by the 4th respondent to carry out a crackdown on the illicit brew. During the operation, he came across two motor vehicles with registration no. KKK 870 and KAC 520C which were unattended and parked on the roadside and the owner was unknown to the public. The vehicles had suspect insurance certificates, and number plates and lacked inspection stickers as required by law, thus the vehicles were towed to the Embu Police Station for further investigations. They only became aware of the purported owner of these two vehicles upon service of the petition yet they had released another vehicle registration number KNP 472 which had been detained in a separate incident.
 8. In both affidavits, the respondents claim that their actions were lawful and were based on protecting the public from the hazardous effects of consumption of the illicit brew and other effects that go with the menace.
 9. Upon hearing of the petition which was argued by way of written submissions, in a considered judgment, the learned Judge held that public interest overrides private rights and that the actions of the respondents were fair, reasonable, and justifiable in the circumstances. The appellant had failed to show how the 4th and 5th respondents had violated Article 10 of the Constitution in the course of



the operation, that on the contrary, the respondents were promoting the national values of human dignity, social justice, and human rights. Further, that the appellant had committed various traffic offences and was, therefore, not entitled to compensation for loss of business and that he had failed to prove any violation of rights as claimed in his petition and he was not entitled to general damages or to compensation for any loss incurred in the operation. The petition was dismissed with each party to bear its own costs.

10. Aggrieved by this decision, the appellant preferred the appeal which is now the subject of this judgment. The grounds of appeal as raised in the memorandum of appeal dated 28th February, 2018 are, *inter alia*, that the learned Judge erred in law and fact by finding that:
 - i. The 2nd, 3rd, 4th 5th, and 6th respondents did not violate the appellant's right to equal protection and right to privacy as guaranteed under Article 27(1) and 31(a) & (b) of the Constitution as read with section 55, 56, 58 and 60 of the Alcoholic Drinks Act, 2010.
 - ii. Failing to find that they took the law into their hands and violated the appellant's right against psychological torture as guaranteed under Article 29(d) of the Constitution of Kenya.
 - iii. Finding that the demolition of the appellant's premises was the effective measure contemplated by section 3(e) of the Alcoholic Drinks Control Act, 2010.
 - iv. Finding without any evidence that an illegal business was being conducted in the appellant's premises.
 - v. Failing to find that the 2nd, 3rd, 4th, 5th, and 6th respondents violated the appellant's right to property as guaranteed by Article 40 of the Constitution as read with section 8 of the Traffic Act, Cap 403.
 - vi. Finding that section 9(1) of the Traffic Act, Cap 403 authorised the 2nd, 3rd, 4th, 5th and 6th respondents to deprive the appellant of his motor- vehicles.
 - vii. Finding that the 2nd, 3rd, 4th, 5th, and 6th respondents did not violate the appellant's right to fair administrative action as guaranteed under article 47 of the Constitution as read with sections 55 and 56 of the Alcoholic Drinks Control Act and section 14 of the Traffic Act.
 - viii. Failing to find that the 2nd, 3rd, 4th, 5th and 6th respondents violated the appellant's right to a fair trial as guaranteed under Article 25(c) and 50 of the Constitution.
11. The appeal was heard on the 31st of January, 2023 with minimal highlighting. Learned counsel Mr. Gachuba appeared for the appellant whereas Miss Wawira appeared for the respondents. They indicated to the Court that they would rely on submissions filed at the High Court. In support of the appeal, counsel for the appellant urged us to find that the learned Judge erred in failing to consider the entire petition and evidence in support, a contravention to Article 27(1) of the Constitution. That pursuant to sections 15(2)(a) of the National Government Co-ordination Act, 2013, the 4th respondent, who was the holder of office of the 3rd respondent, failed to demonstrate that the forceful entry into the residence was a function of the national government, as provided under the Constitution.
12. The 4th and 6th respondents admitted that they had broken into the appellant's residence and even towed away motor- vehicle registration numbers KAG 520 G and KKK 870 contrary to section 4(1) (2) of the Third-Party Risk Act, Section 6(1)(7), 17A (3) and 29(1) of the Traffic Act and Rule 4(1) (a)(c) of the Traffic Identification Plate Rules, 2015. Yet the learned Judge held that the conduct was in the public interest and justified under Articles 24(1)(3), 26, and 46 of the Constitution and that it was ultra vires the Alcoholic Drinks Act, 2010, and the National Authority for the Campaign against



Alcohol and Drug Abuse Act, 2012. Further, that the learned Judge erred when she refused to grant the release of the said motor vehicles contrary to section 22 of the National Authority for the Campaign Against Alcohol and Drug Abuse Act, 2012, and section 61 of the Alcoholic Drinks Control Act. We were urged to find that the learned Judge erred in finding that the appellant had breached the Traffic Act and Third-Party Risk Act in the absence of any evidence and thus he prayed that we set aside the impugned judgment in the interest of fair trial and justice.

13. The respondents' counsel urged us to rely on the submissions filed at the High Court. It was submitted that there had been no violation of the appellant's fundamental rights; that the officers had conducted their mandate as provided by the law.
14. This being a first appeal, it is trite law that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from the High Court is by way of retrial. Briefly put, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance for that. See *Selle and Another -vs- Associated Motor Boat Company Limited & others* [1968] EA123. As we discharge our mandate of re-evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters v. Sunday Post Ltd* [1958]EA 424. It was held:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide...”
15. The appellant had the onus to demonstrate that the cited rights had been infringed by the respondents. In *Anarita Karimi Njeru -vs- Republic* (1979) KLR 154 it was held that a party who alleges that there has been a violation of a constitutional right must cite with reasonable precision the provisions of the Constitution containing the rights which have been violated. The appellant urged that he was entitled to equal protection and benefit of the law.
16. Article 27 of the Constitution gives every person equality and freedom from discrimination whereas Article 27(1) which he says was violated provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The provision requires that every person who alleges that his right to non-discrimination has been violated has to satisfy the court that there was a distinction between him and the others.
17. The gravamen of this appeal is whether the 2nd, 3rd, 4th, 5th and 6th respondents had power to enter into the appellant's premises without his consent or court order and thereafter demolish his premises and tow away motor-vehicle registration numbers KKK 870 and KAG 520G. The appellant maintains that the respondents had no power to do so, and their actions were unlawful. The 6th respondent admitted to having towed these vehicles to Embu Police Station upon finding them at the road reserve without the public knowing the owners. Upon scrutiny, it was discovered that KKK 870 did not have a valid insurance certificate while the number plate for KAC 520 G appeared handwritten and the insurance sticker had expired. A search at the Registrar of motor vehicles revealed that KKK 870 was registered under James Kinyanjui while KAC 520G was registered under Kenya Wildlife Services. The vehicles had suspect insurance certificates, and number plates and lacked inspection stickers.
18. The appellant produced a sale agreement dated 6th January, 2015 for motor-vehicle registration No. KKK 870 and an invoice and payment slip for KAC 520G as evidence of ownership. Section 8 of the



- Traffic Act provides that a person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner. Section 9(1) of the Traffic Act provides that no motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on the road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner.
19. The appellant did not give any reason for not changing the ownership of the said vehicles. This was contrary to section 9(1) of the Traffic Act and the 6th respondent in his affidavit had averred that the appellant was still under investigation and he was to be arraigned in court for traffic offences in regard to the said vehicles. According to the respondents, after the said motor vehicles were taken to the police station, the appellant never presented himself to the police station with the necessary documents to claim the motor vehicles. They said they learnt that the same were claimed by the appellant after they were served with the petition. This would, therefore, mean that the respondents had not detained the appellant's motor vehicles at the police station unlawfully. The appellant should have gone to the police station and demonstrated that the vehicles in question belonged to him and not to the persons registered as the owners. The learned Judge did not, therefore, err in declining to grant an order of release of the motor vehicles in question to the petitioner.
 20. Turning to the alleged forceful entry of the appellant's premises, the appellant produced a certificate of official search which indicated that the land was registered under his mother's name and that the approved plans had been issued by the Embu East Sub-County Planning Officer. The applicant contended that when the respondents entered without his authority or permission, and demolished the premises then his right to acquire and own property as provided by Article 40(1)(a) & (3) & (6) had been violated. According to the appellant, upon entry into his premises, the respondents violated his right to privacy as guaranteed in Articles 31(c) & (d) and 43(1)(e) of the Constitution. We note, however, that from the available records, the land in question, which would inevitably include the buildings on it did not belong to the appellant and it was upto him to demonstrate, to the satisfaction of the court, that he was the beneficial owner.
 21. As cited by the appellant, section 17 of the National Government Coordination Act, 2013 provides that an administrative officer shall be responsible for the coordination of National Government functions. The 4th and 6th respondents who were the holders of these offices averred that indeed they broke into the appellant's premises after an outcry from the public about the production of illicit brew at the appellant's premises. Another raid had been conducted by the area MP and the Embu West District Security Committee where illicit brew was found. There were several raids nationwide prompted by public outcry following many deaths and health complications such as blindness caused by the consumption of the illicit brew in the Country. In various incidents such as November 2001, it was reported that over 140 people had died, in June 2005, 49 people had died and 174 were hospitalized whereas in 2014 more than 80 people had died of similar causes while 170 had been hospitalized. The respondents maintained that all this was in the public domain and the appellant being a Kenyan citizen was aware of the same.
 22. As held by the learned Judge, the preamble of the Alcoholic Drinks Control Act was to implement effective measures to eliminate illicit trade in alcohol including smuggling, illicit manufacturing, and counterfeiting. This put the law enforcement officers at the forefront to fight the menace of illicit brews in order to avert the death and complications arising from the consumption of such alcohol. This is contrary to the appellant's assertion that there is no provision in the Alcoholic Drinks Control Act 2010 and the National Authority for the Campaign Against Alcohol and Drug Abuse Act 2012 that appointed



the 2nd, 3rd, 4th, 5th and 6th respondents as the enforcers of law. Additionally, Section 14(1) of the [Police Act](#) provides as follows:

“The forces shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.” (Emphasis ours).

The 4th respondent acknowledged that after receiving information that the appellant continued with the manufacture of the illicit brew, his premises was raided and the 6th respondent acting on instructions of his boss, the officer Commanding Police Division Embu which is in line with section 15(2) of the said Police Act, thus, had assisted in the raid so as to prevent the commission of offences.

23. In addition to the above, section 3 of the [Alcoholic Drinks Control Act](#) provides the object and purpose of the Act including the protection of the health of individuals and the protection of underage persons and of consumers, public education, elimination of illicit trade in alcohol, treatment, and rehabilitation of addicts and the promotion of research and dissemination of information on the effects of consumption of alcoholic drinks. The appellant urged that part VII of the [Alcoholic Drinks Control Act](#) required authorised officers appointed by the Minister to inspect premises, the respondents did not prove that they had been authorised to raid his premises and thus it was contrary to section 50 of the and section 19 of the [National Authority for the Campaign Against Alcohol and Drug Abuse Act, 2012](#).
24. However, section 50(3)(a) & (b) of the [Alcoholic Drinks Control Act, 2010](#) provides that an authorised person includes a public health officer appointed under the [Public Health Act](#) and any other person upon whom any written law vests functions of the maintenance of law and order. Section 51(1) of the said [Act](#) provides as follows:

“For the purposes of ensuring compliance with this Act, an authorised officer may, at any reasonable time, enter any place in which the officer believes on reasonable grounds that any person or persons is in any way contravening the provisions of this act.

- (2) an authorised officer entering any premises under this section shall, if so required, produce for inspection by the person who is or appears to be in charge of the premises the certificate issued to him under section 50(2). (Emphasis added).

Our understanding of the above proviso is that a police officer who has been mandated to maintain law and order by section 14(1) of the [Police Act](#) is an authorised person contrary to the appellant’s submission. Further, the issue of production of certificate in the terms of the section is not mandatory. It is not required nor does it compel or make it mandatory to produce it. In this instance, the appellant was not even within the premises. He deponed that at the time of the raid he was hospitalised. How then was he to be served, yet upon access to the premises nobody was inside?

25. We, therefore, find that in furtherance of the objectives of the Act, the police were carrying out their mandate as provided in section 14(1) of the [Police Act](#). The search and seizure of the appellant’s premises and motor vehicles was for the purpose of an important purpose in the fight against crime. When a State has a pressing interest, which involves the security and freedom of the community as a whole, search and seizure is beyond question. It is an objective that is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. It is for this



purpose that the police invaded the premises, which the appellant has not disputed is his but has not disclosed what transpires inside.

26. The appellant did not dispute that his wife had been charged in a different court with the sale of the illicit brew, and there was hue and cry in the area that illicit brews were being manufactured or kept inside the said premises. Therefore, the officers, in this case, had a good and justifiable reason to invade the premises without the appellant's authority for the purpose of seizing the illicit brew to avert it from being sold to the public. It is in the interest of the public that citizens are not subjected to arbitrary searches and seizures that in essence can violate other fundamental rights and freedoms of other people. In this case, the larger populace had a right to be protected from exposure to harmful illicit brews that were suspected to be coming from the raided premises.
27. As stated by the learned Judge, there are a few inalienable rights which can be enjoyed in absolute terms. However, most rights are subject to limitations that are necessary and reasonable in a democratic society for the realization of certain common good such as social justice, public order, and effective Government and for the protection of the rights of others.
28. Having considered the record before us in its entirety, and for the reasons we have given, we find that the appellant herein failed to prove any violation of his rights as claimed in the petition and he was not, therefore, entitled to general damages or to compensation for any loss incurred during the operation. We also find that some of the claims made by the appellant in his petition, like compensation and general damages for loss of business were actually special damages which ought to have been specifically pleaded and proved. This would not have been possible by way of petition as filed by the appellant. Besides, the said motor vehicles were not in his name, nor was the premises said to have been demolished. After re-evaluating the evidence on record, it is clear to us that no damages could have been awarded to the appellant on the basis of the evidence presented before the High Court.
29. Accordingly, for the reasons set above, we find no fault in the findings by the learned Judge. This appeal is without merit and is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

