



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MUSINGA & MURGOR, JJA)**

**CIVIL APPEAL NO. 73 OF 2015**

**BETWEEN**

**ERNEST C.O. MUGA.....APPELLANT**

**AND**

**THE ATTORNEY GENERAL.....RESPONDENT**

***(Appeal from the judgment and order of the High Court of Kenya***

***at Nairobi (Mumbi Ngugi, J.) delivered 9<sup>th</sup> December 2011***

***in Petition No. 1199 of 2007)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant, **Ernest C.O. Muga**, was a Financial Attaché in the Ministry of Foreign Affairs as represented by the Attorney General (**the government**). He served in Lagos, Nigeria, from 1987 to 1994, when his tour of duty ended and he was posted to Nairobi, Kenya. His personal effects comprising house hold goods and two motor vehicles, a Mercedes Benz 200E Registration number 74 CD 16 and a Peugeot 505 Registration number 74 CD 15 were to be shipped from Lagos to Nairobi. The goods were not shipped immediately, but remained in storage for several months, where they accrued storage and demurrage charges. They were retained until sometime in 2002, when the government paid the charges, and the goods were released to the Mission's officials. They were thereafter sold and transferred to officials in the Kenya High Commission in Nigeria, David Mutemi, the Kenya Ambassador to Nigeria and a senior officer, Mr. Suge. The appellant did not receive any of the proceeds of the sale.

The appellant was aggrieved by the failure on the part of the government to transport his personal effects to his home country after completion of his posting, and claimed that he was unlawfully deprived of his personal property by the government which occasioned him grave loss and damage.

The appellant claimed for;

- i) a declaration that the appellant was unlawfully deprived of his property by the government;*
- ii) an order that the government compensate the appellant for the loss of property and the consequential damages;*
- iii) an order that the appellant be paid interest on the sums found due at the prevailing commercial rates; and*
- iv) an order that the respondent pay the costs of the petition.*

The respondent's case is that the appellant, who was in job group 'J', was entitled to baggage allowance of a maximum of 40 tonnes and a 40 foot container. But the appellant delivered goods amounting to 8866 tonnes to the shipping agent as well as a Mercedes Benz weighing 2000 kgs, and a Peugeot 505 weighing 1300 kgs, which was in excess of his entitlement. The additional tonnage was not communicated to the High Commission. On 2<sup>nd</sup> August 2002, the government paid the storage charges, after which the motor vehicles were released. They were subsequently sold by way of auction.

The Constitutional and Human Rights Division of the High Court dismissed the appellant's petition after concluding that the appellant's remedy lay in a claim for damages against his employer, the Government of Kenya, which had a contractual obligation to ship his goods home and was not a constitutional reference for the violation of his fundamental rights under *section 75* of the retired Constitution. The court further found that though the appellant had suffered loss, such loss could not amount to compulsory taking of property as contemplated by *section 75* of the retired Constitution.

The appellant was displeased with the decision and has appealed to this Court on grounds that the learned judge erred in law and in fact in finding that the loss of property by the appellant, and the acts of the government and or its agents did not amount to violation or deprivation of property under the then *section 75 (1)* of the retired Constitution; in finding that the appellant's remedy lies in damages against the employer, in failing to grant such damages and give impetus to the legal position of doctrine of *respondent superior* with regard to the liability of loss of the appellants' household goods and motor vehicles.

**Mr. Ojienda, S.O**, learned counsel for the appellant, stated that the appellant would rely on the written submissions filed on 25<sup>th</sup> November 2016, which submissions outlined 4 issues for determination.

On the first issue of whether the loss of property of the appellant amounted to a violation of the appellant's rights to own property under the repealed Constitution, it was submitted that the respondent took possession of the appellant's property without any basis, and failed to comply with *section 75* of the repealed Constitution; that the appellant was illegally deprived of the property which belonged to him together with the benefits that he would have enjoyed had the motor vehicle and household property been transported to Kenya. It was asserted that the packing agent had refused to transport the property for a period of 7 years, and therefore the Government was liable to pay the high storage and demurrage charges that had accrued due to the delay and failure to ship the appellant's property to Kenya; and that the appellant was also entitled to the interest and profits he would have earned from the motor vehicles from 1994 to 2016. Counsel cited the case of **R vs Chief Immigration Officer [1976] 3 AER 843** for the proposition that no person shall be deprived of their property.

The next issue was whether the appellant's remedy lay in damages and the failure to grant such damages. Counsel submitted that the trial court had the jurisdiction to hear and determine the case under *section 55* of the retired Constitution; that the Government Proceedings Act and the Public Service Act specify the mode by which public servants can institute proceedings against the government; that the appellant had filed the suit in the right forum, and the learned judge had the jurisdiction, and was empowered to grant the remedies sought, but declined to exercise those powers. In support of this position, counsel relied on the Ugandan case of **Mawenzi Investments Limited vs Top Finance Co. Limited & Another HCCS No 2 of 2013**.

With respect to the issue that the learned judge failed to give impetus to the legal position of the doctrine of *respondent superior* with regard to the liability of loss of the appellants' household goods, it was submitted that having admitted delaying the transportation of the appellant's goods leading to the appellant being deprived of those goods, the respondent is liable for the loss, and the violation of the appellant's rights to property. The appellant was therefore entitled to general and special damages on the value of the Mercedes Benz and Peugeot, the cost of travel to Nigeria, the purchase of a house, and compensation of the lost household goods and travel expenses.

In response, learned counsel for the respondent, **Ms. Wawira**, stated that they had filed written submissions on 9<sup>th</sup> July 2018, upon which they would be relying, and in which two issues were framed, which were whether the learned judge erred in holding that the appellant did not disclose any violation of his rights and whether the court had jurisdiction to award the appellant damages. It was submitted that the appellant has not demonstrated that his fundamental rights under *section 75* of the retired Constitution were infringed, that the learned judge rightly found that the appellant's loss arose from his terms of service as an employee of the Government and not from the unconstitutional taking of his property in violation of *section 75*, and that the remedy lay in a claim for damages against the government which had a contractual obligation to ship his goods to Kenya.

On the issue of whether the court had jurisdiction, it was submitted that the court rightly concluded that it was the Employment and Labour Relations Court that had the jurisdiction to hear and determine the matter and not the constitutional division of the High Court. In support of this contention, counsel cited **United States International University vs Eric Rading [2012] eKLR**.

We have considered the pleadings, and the submissions of counsel and this being a first appeal, as stated in the case of **Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212**;

***“On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence.”***

In our view the issues that fall for our consideration are;

*i) whether the Petition disclosed a violation or deprivation of the appellant's right to property under the then section 75 (1) of the Constitution of Kenya (repealed) or whether the facts disclosed a case of breach of contract;*

*ii) whether, depending on the conclusion in (i) above, the appellant was entitled to damages for violation of his fundamental rights.*

We begin by determining whether the Petition disclosed a violation or deprivation of the appellant's right to property under *section 75 (1)* of the Constitution of Kenya (repealed) or whether the facts disclosed a straightforward case of breach of contract.

In this regard the learned judge stated;

**“...from the evidence adduced before me, the loss arose in relation to his terms of service as an employee of government, not from an unconstitutional taking of his property in violation of Section 75 (1) (a). His remedy lay in a claim for damages against his employer, the government, which had a contractual obligation to ship his goods home, and not in a constitutional reference alleging violation of his fundamental rights under Section 75. Even were the court to find that government officers did, as alleged by the Petitioner, take his motor vehicles, such taking, though wrongful, would not amount to a deprivation as contemplated under section 75 of the repealed constitution.”**

The facts of the case show that the appellant was an employee of the government deployed to Lagos, Nigeria, as a Financial Attaché. He completed his tour of duty in 1994 and was posted to Nairobi. Being a returning government official, his goods were to be shipped at government expense, and a firm known as Oko- Bas Enterprises was contracted to transport his personal effects.

The appellant departed from Lagos before his personal effects and the motor vehicles were shipped, and the High Commission was not informed of their storage or the excess weight. As a consequence, the personal effects and the motor vehicles remained in storage for several months, where they accrued increasing storage and demurrage charges, resulting in their being detained by the shipping agent as security for the unpaid storage charges.

On 2<sup>nd</sup> August 2002, the government paid the storage charges and the motor vehicles were released to the Mission’s officials. By a letter dated 2<sup>nd</sup> May 2002, the Permanent Secretary in the Ministry of Foreign Affairs at the time, ordered that they be sold. They were auctioned, and eventually ended up in the names of, Mr. Mutemi and Mr. Suge.

The facts as presented disclose the existence of an employer and employee relationship between the appellant and the government, and there is no question that the transportation of the appellant’s personal effects arose from that employment relationship. The terms of transportation of personal effects was to be found in the Kenya Foreign Service Regulations.

Of relevance, **regulation D19** of the **Kenya Foreign Service Regulations 1985** provided that;

**“An officer who is posted outside of Kenya or who is transferred to another posting or who is proceeding to Kenya on completion of his term of duty is entitled to claim at public expense the cost of forwarding his baggage to the next destination.”**

After considering the circumstances of the case, the learned judge concluded that the appellant had indeed suffered losses, but took the view that they were not as a result of an unconstitutional taking of his property in violation of *section 75 (1) (a)*, but that his remedy lay in a claim for damages against his employer, the government, which had a contractual obligation to transport his goods home.

This Court has consistently and variously stated that the Constitutional Court should not be misused for the determination of ordinary civil and legislative disputes that are made to masquerade as Constitutional litigation, seeking to enforce fundamental rights. In upholding this position, in the case of **Royal Media Services Limited vs The Attorney General Civil Appeal No. 45 of 2012**, this Court stated;

**“...In our view the judge cannot be faulted for holding that a constitutional petition procedure adopted by the appellant in ventilating its claim was ill suited for the kind of claim it had laid before the trial court namely debt collection. We had occasion in the past to bemoan the current trend of filing constitutional petitions and references on matters or claims that have no iota or scintilla of any constitutional bearing. This trend of constitutionalising virtually everything, which is actually, in our view an abuse of the court process, needs to be nibbed in the bud and frowned upon. We stated thus in the case of Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another [2016] eKLR:**

**“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of Harrikissoon v Attorney General [1980] AC 265, the Privy Council held that:-**

**‘...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to an individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action.....’**

**Again in the case of Re Application by Bahadur [1986] LRC (Const) 297, a case also from Trinidad & Tobago, the above Court held emphatically that:-**

**‘.....The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action and that where infringements of rights can found a claim under substantive law, the proper course would be to bring the claim under that law and not under the Constitution.’**

**In the South African case of SA Naptosa & Others v Minister of Education Western Cape & others [2001] BLLR 338 at 395, the Western Cape High Court observed:-**

**‘...If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be**

obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the act, the Act might come under scrutiny for not giving adequate protection to a constitutional right...

**Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. In the case of Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR, this Court observed:-**

‘.....Citing the case of **Alphonse Mwangemi Munga & Others vs**

**African Safari Club Ltd [2008] eKLR**, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference.

Having heard counsel submit on this issue of jurisdiction and also having gone over the nature of the pleadings as placed before the High Court as well as the manner in which that court found and determined the reference, we do not discern any fault on the part of the learned judge. We say so because the drafting, tenor and substance of the reference before her was essentially on breach of terms of employment. All this shines through the quotations (above) from the petition as regards the orders, and prayers stated. The appellant was hired by the 1st respondent as Deputy Vice Chancellor according to the Kenyatta University Act. In alleged breach of that employment contract, the 1st respondent allegedly sent him on compulsory leave, suspended him from duty and stopped his emoluments before finally firing him. So the appellant had gone before the High Court for declarations/orders that the compulsory leave was void, terminating his employment should be halted and he should be paid compensation. To my mind, this petition was essentially an employment claim that should have gone to the Industrial Court in accordance with **Article 162 (2) (a)** above, and the learned judge rightly declined jurisdiction over it....’

**Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-**

‘...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....’

**Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.**

**A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014, the Supreme Court delivered itself thus on the issue:-**

‘[256] The appellants in this case are seeking to invoke the “**principle of avoidance**”, also known as “**constitutional avoidance**”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided **on another basis**. In South Africa, in **S v. Mhlungu, 1995 (3) SA 867**

(CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

**“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”**

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347*

(1936)).”

**We reiterate that this was not a proper case where the infringement of Constitutional rights should have been involved. It was a simple case of breach of contract whose remedy lay elsewhere”.**

We would further add that, in the case of **John Harun Mwau vs Peter Gastrow & 3 Others [2014] eKLR** the Court stated that;

***“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.***

***... It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”***

And in the recent case of ***Francis Gathangu vs Kenyatta University [2018] eKLR*** where the question, in a dispute brought as a constitutional petition, whether the appellant was entitled to payment of his salary and other benefits during the period of his suspension from employment, this Court also held that;

***“... the dispute was not a suitable matter to be characterized as or presented as a constitutional petition. It was no more than a regular employment dispute between an employer and an employee based on the contract of employment, and statutes governing that contract. The remedies sought were, on the facts, unavailable under the Constitution and the learned Judge was within rights and entirety justified in dismissing the petition”.***

We adopt the above pronouncements, and have nothing further to add. We agree with the learned judge in the instant case that, the transportation of the appellant’s personal effects was a term of the appellant’s employment contract with the government, his employer, and that any claim for failure to transport his goods would of necessity have given rise to an action for damages against his employer for breach of contract, and not a constitutional reference for infringement of property rights. We find no reason to interfere with the learned judge’s decision. The appeal lacks merit and is hereby dismissed.

In view of the appellant’s retired status we order each party to bear their own costs.

***Dated and delivered at Nairobi this 12<sup>th</sup> day of October, 2018.***

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**