



IN THE COURT OF APPEAL

AT NYERI

(CORAM G.B.M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 68 OF 2016

BETWEEN

MWANGI MUTAHI RUGA ..... APPELLANT

AND

NYERI COUNTY GOVERNMENT ..... RESPONDENT

*(Being an appeal of Petition No. 3 of 2012 heard and determined by (Wakiaga, J.) and the respective review by (Ngaah, J.)*

JUDGMENT OF THE COURT

The appellant **MWANGI MUTAHI RUGA** filed a Constitutional Petition dated 24<sup>th</sup> August, 2012 alleging contravention of his fundamental rights and freedoms under **section (sic) 31(a) and (b)** (supposedly of the Constitution). In the petition he alleged - **“That the Municipal Council of Nyeri broke and entered into my vehicle KSP 174 took and detained it with all the items there in claiming that I owed them Ksh.50 of which they had not demanded.”**

It would appear that the respondent resisted the petition by an affidavit of one Charles Gichuki Gachana, as can be discerned from the judgment of Wakiaga, J. dated 20<sup>th</sup> February, 2014 although it was not part of the record. In his judgment, the learned judge came to the conclusion, inter alia, that the appellant’s cause of action was **“...purely a commercial dispute which should have been filed by way of a plaint in which the petitioner should have claimed restitution and general/special damages for loss of user in compensation.”**

The appellant was dissatisfied with the said outcome and filed a motion dated 14<sup>th</sup> March, 2014 seeking a review of Wakiaga’s, J. Judgment.

The review application was heard by Ngaah, J. who dismissed it in a ruling dated and delivered on 15<sup>th</sup> May, 2015. Undeterred, the appellant filed a Notice of Appeal on 8<sup>th</sup> June, 2015, **“Being dissatisfied with the decision of Hon. Justice J. Wakiaga of 20<sup>th</sup> February, 2014 and that of Hon. Justice Ngaah Jairus J. of 15<sup>th</sup> May, 2015....”** In his memorandum of appeal dated 19<sup>th</sup> October, 2016 the appellant listed the following grounds of appeal:

**“1. That the court summarily dismissed my petition without determining the following issues in the petition.**

**(a) Whether the breaking and entering my vehicle without authority from a court of law (sic) is unconstitutional.**

**(b) Whether confiscating or attachment of property without authority from (sic) a court of law is constitutional.**

**2 That the court in summarily dismissing the petition breached section 23 (1) & 23(3) of the Constitution.**

**3 That the Court in summarily dismissing the petition breached (sic) section 26(2) and 27(2) Chief Justice. (sic)**

**4 That the court in summarily dismissing the petition ignored the provisions in sec 22(1) (sic) of the constitution.**

**5 That the court denied me a hearing when I went back for a review and directions.”**

During the plenary hearing before us on 17<sup>th</sup> July, 2017 the appellant contended that the respondent’s actions of towing his motor vehicle led to his filing of the Constitutional Petition which was dismissed by Wakiaga, J. who ruled that he should have filed a claim by way of a

plaint. He was aggrieved by the outcome and he filed an application for review which was also dismissed by Ngaah, J. In his view the dispute between him and the appellant remains unresolved and that it is absurd that his motor vehicle is still with the respondent, whose counter claim is also still in limbo. He asked us to order that the dispute between him and the respondent be reheard in the High Court and the dispute be determined on merits.

In opposing the appeal Mr. Gitibi for the Respondent urged us to find that the appellant having filed an application for review under **Order.45** of the Civil Procedure Rules had no right of appeal as he cannot now appeal against the judgment of Wakiaga J. Secondly, that the application for review before Ngaah, J. did not meet the threshold of **O.45** of the Civil Procedure Rules.

The facts of this case are fairly simple and straightforward. The motor – vehicle registration No. KSP 174 belonging to the appellant was in the respondent’s County and as parking fees had not been paid, the respondent towed it. The appellant’s contention was that he was not to pay the parking charges as the motor vehicle was under repair. That may well have been the case but did it warrant the filing of a Constitutional Petition? We do not think so. Wakiaga, J. considered the constitutionality of the appellant’s claim and concluded as follows:-

**“I am unable to see how the Respondent in exercising its statutory powers breached the rights of Petitioner to privacy under Article 31(a) and (b) as alleged noting that the Petitioner might have a valid claim against the Respondent if it did not follow the right procedure but not for violation of his constitutional rights under Article 31 as alleged.”**

In **METHODIST CHURCH OF KENYA TRUSTEES REGISTERED & ANOTHER V. REV. JEREMIAH MUKU & ANOTHER [2012] eKLR** this court addressed the issue of litigants invocation of a constitutional right for all manner of claims. It observed:-

**“... but it must be remembered that Constitutional reference are not a panacea or resolution of all types of legal disputes.”**

The appellant may have had a valid claim against the respondent, but as stated by Wakiaga, J. his cause of action was a commercial dispute to be determined by the rules set out in the Civil Procedure Act. We cannot fault the judge for having so determined as the appellant’s remedy lay elsewhere and it was not a breach of his fundamental rights so as to call in aid a Constitutional Petition.

Besides the appellant having filed an application for review exhausted his right of appeal. O.45 of CPR provides as follows.

**“(1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed,**

**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

Again we cannot fault the ruling of Ngaah, J. as he properly considered the merits of the application for review and came to the conclusion that it was outside the ambit of **O.45** of the CPR. We too are of a similar view.

Accordingly we find no merit in this appeal. It is hereby dismissed with no order as to costs as we note that the appellant has all along not had the benefit of counsel.

**Dated at Nyeri on this 20<sup>th</sup> day of September, 2017.**

**G.B.M. KARIUKI**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**