



**Akach v In-Charge Directorate of Criminal Investigations & 3 others;
Njoroge (Interested Party) (Petition E266 of 2022) [2024] KEHC 3126 (KLR)
(Constitutional and Human Rights) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E266 OF 2022
LN MUGAMBI, J
MARCH 20, 2024**

BETWEEN

LINDA ATIENO AKACH PETITIONER

AND

**IN-CHARGE DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST
RESPONDENT**

DIRECTOR, SPECIAL SERVICE UNIT – DCI 2ND RESPONDENT

AND

ATTORNEY GENERAL REPUBLIC

AND

NATIONAL TRANSPORT AND SAFETY AUTHORITY RESPONDENT

AND

MUTURI NJOROGE INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioner, Linda Atieno Akach filed this Petition dated 2nd June 2022. It is supported by the petitioner’s affidavit in support sworn on even date, the supplementary affidavit dated 24th March 2023 and the further affidavit dated 24th July 2023.



2. The gist of this petition is that the respondents' actions in dealing with vehicle Land Cruiser V8 registration number KCA 500D, violated her constitutional rights under Articles 40, 46, 47 and 50 of *the Constitution*. The Petitioner thus seeks the following reliefs against the respondents:
 - a. A declaration that the respondents' conduct, jointly and severally, has been in contravention of provisions of *the Constitution* particularly Article 40, 46, 47 and 50 and as a result infringed on the petitioner's right to property, consumer rights, right to fair administrative action as well as right to fair hearing.
 - b. A mandatory order that the respondents' hand over the petitioner's vehicle, registration number KCA 500D to the said petitioner.
 - c. An order prohibiting the respondents from dispossessing and or impounding the petitioner's motor vehicle registration KCA 500D.
 - d. Damages for violation of the petitioner's rights.
 - e. Cost of the suit.
 - f. Any other order and or relief the court deems just and fit to grant.

The Petitioner's Case

3. In August, 2018 the petitioner claimed that she bought the subject vehicle KCA 500D from one Moez Mansurali Didarali and the same was registered her favour upon transfer making her its bonafide owner. Prior to purchasing it, she had done due diligence by conducting a search on the 4th respondent's system and confirmed that Moez Mansuli Didarali was the registered owner of the vehicle.
4. Around August 2019, the 2nd respondent's Special Service Unit informed the petitioner that the subject vehicle had been flagged by Kenya Revenue Authority (KRA) as having outstanding custom duty fee. She presented thus presented herself and the vehicle to the 2nd respondent's officers who opened Inquiry file No.3 of 2019 SCU to undertake investigations.
5. According to her, the investigations confirmed current and previous owners of the subject vehicle and that the custom duty had infact been paid. However, in the course of the investigations, the officers discovered that there was double registration had occurred in respect of the same motor vehicle. Another motor vehicle KCA 007Y had been registered with the same chassis number as the Petitioner's vehicle.
6. She stated neither she nor the other previous owners were aware of the said double registration. This second registration was revealed to belong to the 2nd interested party who could not be traced at that at the time. In the meantime, a decision was made to release the vehicle to her as investigations continued.
7. On 8th May 2022, while her husband was driving the subject vehicle along Valley Road, the 2nd respondent's officers attached to the 4th respondent flagged him down and impounded the vehicle allegedly on the basis of a of a complaint lodged by the 2nd interested party that his vehicle of similar make had been stolen. This triggered fresh investigations into the true ownership of the vehicle and the vehicle could not be released.
8. The petitioner stated that despite her pleas that the 2nd respondent's Special Service Unit had already done investigations; the officers insisted that tape lifting be done and in-depth investigations be conducted to reveal the true owner. This was conducted on 12th May 2022 and revealed the same results as had already been unearthed by the Unit.



9. It is her assertion that the continued impounding of the subject vehicle by the 2nd respondent's officers is in breach of her constitutional rights. Additionally, she noted that she had been cooperative with the 2nd respondent's officers since 2019 when the initial investigations conducted.
10. The petitioner is further aggrieved that despite having followed the due process and conducted her due diligence, the subject vehicle is claimed to have been fraudulently obtained. According to her if at this is so, then it is as a result of the 4th respondent's officers' negligence and outright fraud, which exposes innocent purchasers such as her as a victim of duplicitous schemes.
11. She is as well aggrieved that despite the claim of motor vehicle KCA 007Y having been stolen, the 2nd interested party continued transacting with the vehicle whereby on 9th April 2021 he transferred the vehicle to one Gilbert Muturi Mbatia and subsequently to Augustine Wambua Matata. It is her argument thus that the 2nd interested party lacks locus standi to make the instant claim.
12. It is equally, asserted that the possibility of this circumstance and the various discrepancies as detailed in the supplementary affidavit was not expounded on by the respondents. In fact, she averred that following her complaint to the National Police Service - Internal Affairs Unit over the conduct of the 1st and 2nd respondent in handling the dispute, it was acknowledged that the investigation did indeed raise a number of questions as seen in the letter dated 17th July 2023 attached to the petitioner's further affidavit.

The 1st and 3rd Respondents' Case

13. In response these respondents filed a replying affidavit by PC Isayah Rakita (No.117746B) sworn on 27th January 2023 where, as the investigating officer, he asserted that the petition was based on a misrepresentation of facts and filed in bad faith.
14. He averred that on 2nd April 2017, a report was made to Kiambu Police Station vide OB No.02/02/04/2017, that a Toyota Land cruiser V8, black in colour and bearing registration No. KCA 007Y had been stolen. The report was instantly circulated in the police media. The investigation however bore no fruits and so remained pending.
15. Later, on 21st March 2019, KRA issued a circular REF: KRA/5/1006/IED/039 informing that the subject vehicle in this matter was a fraudulently registered. This is because its customs duty fee had not been paid. He noted that this is when the first investigation by the 2nd respondent's Special Service Unit was conducted. This Unit has since been disbanded.
16. He informed that their investigations and tape lifting revealed that the physical chassis number of the subject vehicle was UZJ200-4012968 while the petitioner's logbook indicated chassis number UZJ2004012968. A search over the discrepancy on the 4th respondent's system revealed that chassis number UZJ200-4012968 belonged to motor vehicle registration no. KCA 007Y with custom entry number 2014MSA5093855 owned by the 2nd interested party. On the other hand, chassis number UZJ2004012968 disclosed that it did not have a custom entry number.
17. A search for the 2nd interested party at the time proved futile as his phone contact details on the 4th respondent's account were different from the number he uses. At that point due to this, the officers decided not to impound the car.
18. Later on, in May 2022 following the 2nd interested party's police report the subject vehicle was flagged down to continue the investigations. It was stated that the 2nd interested party's log book matched physical chassis number UZJ200-4012968 which had been tape lifted from the petitioner's car. Equally



the investigations also unveiled the records of importation of motor vehicle registration number KCA 007Y and the attendant documents.

19. He asserted that with this information, it was clear that there was sufficient evidence that the subject vehicle shares the same chassis number as KCY 007Y which is duly registered to the 2nd interested party. On the flipside, he stated that the petitioner did not offer a justification for the shared chassis number hence leading to the conclusion that the subject vehicle had indeed been stolen.

The 2nd and 4th Respondents' Case

20. The 2nd and 4th respondents in reply filed their replying affidavit by Abdirizak Ahmed Ali sworn on 13th December 2022 and a further affidavit dated 23rd May 2023.
21. The 4th respondent's, Directorate of Investigation and Intelligence received a complaint from Steadfast Credit Limited with reference to motor vehicle registration number KCA 007Y. This vehicle had been used to secure a Ksh.3, 300, 000 loan facility. According to the complainant, the tracking device had been tampered with hence the vehicle could not be traced and so deemed stolen.
22. A search in the 4th respondent's system discovered that the vehicle was jointly registered under Steadfast Credit Limited and one George Mwangi Wanderi. The investigations further revealed that the vehicle had been imported through custom entry number 2014MSA5093855 by Kiveni Limited then transferred to the joint ownership of Njoroge Muturi and Kasinga Susan Nyambura. As stated earlier, the vehicle had chassis physical number UZJ200-4012968 which aligned with the log book.
23. He further deposed that the investigation on the fraudulently registered vehicles by the KRA and the 4th respondent revealed that the subject vehicle was one of the cars that had been registered fraudulently. The investigation in addition found that there was no documentary record of the vehicle in the KRA Simba system that contains information of all new motor vehicles.
24. It was found that this vehicle was fraudulently introduced into the system on 22nd September 2017 bearing chassis number UZJ2004012968 and registered to one Purity Wangui Mungai through a system infiltration. As such it was asserted that any other transaction that occurred thereafter bestowing ownership to a third party is deemed fraudulent making it incapable of passing title to any other party. It was argued that this infiltration cannot be attributed to the 4th respondent as it common knowledge that the ICT system is vulnerable to such attacks.
25. The dubious vehicle was subsequently transferred to Moez Mansurali Didarali on 10th January 2018 and then the petitioner on 16th September 2018. It was moreover discovered that the subject vehicle and the 2nd interested party's vehicle also share the same engine number 2UZ-1271684. The investigations revealed that the subject vehicle physical chassis number which is UZJ200 – 4012968 differs from the one stated in the Petitioner's log book. Further, the dubious vehicle did not have a custom entry number.
26. Owing to the discrepancies in the petitioner's registration, it was believed that the subject vehicle is indeed the 2nd interested party's registered vehicle. It was noted that the subject vehicle had since been released to the petitioner following a court order while the 2nd interested party's vehicle purportedly remains lost and has never been recovered.
27. He further disclosed that since the commencement of the investigations, the registered owners of KCA 007Y had changed and the current owner is George Mwangi Wanderi and Steadfast Microfinance Limited. It was as well noted that the transfer of motor vehicle KCA 007Y that occurred in 2021 was done by the 2nd interested party without the consent of the registered owners. Further that the same



fraudulent system infiltration has since illegally changed the 2nd interested party's phone number on his 4th respondent's account. These issues are said to still be under investigation.

28. In view of these assertions, he argued that the respondents had not violated the petitioner's rights. This is since they had conducted the investigations within the law and further no proof of such violations had been established by the petitioner.

2nd Interested Party's Case

29. In response the 2nd interested party vide his replying affidavit sworn on 6th June 2023 sought to also rely on his supporting affidavit to his chamber summons dated 22nd July 2022. He confirmed that he and his wife Susan Nyambura Kasinga were the registered owners of motor vehicle registration number KCA 006Y bearing chassis number UZJ200 – 4012968.
30. On 31st March 2017, he issued the vehicle to his friend, one James Mwaura to assist prepare funeral arrangements for his wife. Unfortunately, James Mwaura informed him that he had been hijacked on 2nd April 2017 and the vehicle stolen. The same was reported to Kiambu Police Station vide OB No.50/04/04/2017. He also reported the matter to the vehicle's tracking company. The company informed that the tracking device had been tampered with hence they could not locate the vehicle. At the time of being stolen, the vehicle had been used a security to acquire a loan facility of Kshs. 5,000,000 with Opportunity Kenya Limited.
31. The investigations on the loss of the car were unsuccessful until around June 2022 when the 4th respondent's officers summoned him to their office to issue information on the stolen vehicle. He asserted that upon being shown motor vehicle KCA 500D it was clear that it was his car albeit having a different registration number. He and his wife also recorded statements with the Kenya Police Special Unit over the case on 22nd June 2022.
32. It is his assertion therefore that the petitioner does not have any constitutional claim over the vehicle as the person who sold the car to her did not have a valid title. He therefore urged the court to release the said vehicle to him.

Parties' Submissions

Petitioners' Submissions

33. The firm of Okwach and Company Advocates on behalf of the petitioner filed written submissions and a list of authorities dated 17th April 2023. The petitioner also filed further supplementary submissions dated 12th and 23rd June 2023. Counsel highlighted the broad issues for determination as, whether the petitioner's rights had been infringed upon by the respondents thus entitling her the reliefs sought.
34. Counsel relying on the facts stated in the petition and the affidavits in support submitted that although the respondents had concluded that the subject vehicle shared the same chassis and engine number with the 2nd interested party's car, pointing to its fraudulent registration, the respondents had failed to expound on the circumstances leading to the registration, transfer and ownership of the subject vehicle. This was argued to therefore inhibit the judicious determination of this matter by this court in violation of the petitioner's constitutional right to access justice and a fair trial under Article 50 (1) of *the Constitution*.
35. It was further argued that the respondents had failed to inform the Court how it was possible for a stolen motor vehicle that disappeared in 2017 to continue being transacted with and later be transferred to other subsequent owners through the 4th respondent's system. Counsel for this reason argued that



the respondents' manner in carrying out the investigations was negligent as it failed to elucidate on the discrepancies in their findings.

36. In support reliance was placed in C K (A Child) through Ripples International as her guardian & next friend) & 11 others vs Commissioner of Police /Inspector General of the National Police Service & 3 others (2013) eKLR where it was held that:

“The police in the instant petition by failing to conduct prompt, effective, proper, corrupt free and professional investigations into the petitioners complainants, and demanding payments as precondition for assistance, whether for fuel or P3 forms or whatever the case might have been they violated petitioners right to access of justice and right to have disputes that can be resolved by the application of law decided in a fair and in public hearing before court of law in accordance with Article 50 (1) of *the Constitution* of Kenya, 2010.”

37. Furthermore, Counsel on violation of Article 46 of *the Constitution* submitted the petitioner being a consumer reliant on the services statutorily required of and provided by the 4th respondent was entitled to accurate information necessary for her to gain full benefit from the service offered through the its TIMS platform. As such Counsel stated that the 4th respondent's act of denying the correctness of information, more so information disseminated through their official portal was an infringement of petitioner's consumer rights under Article 46 (1) (b) and (c) of *the Constitution*. Reliance was placed in Gituma Kaumbi Kioga v Kenya Revenue Authority & another (2020) eKLR where it was held that:

“In sum, the 1st and 2nd respondents failed in their statutory duties to keep, maintain and disseminate reliable, accurate and correct information on the subject motor vehicle. Such service provided by public or state organs should be verified so that innocent consumers will not be prejudiced when they rely upon it. In this case, the petitioner relied upon information provided by official sources and platforms maintained by public organs to his detriment. The information provided guaranteed that the vehicle was without encumbrances, thus, making innocent purchasers like the petitioner to buy uncustomed vehicles. Accordingly, his right to information necessary to gain full benefit of goods and services was violated by the 1st and 2nd respondents. The two respondents are therefore estopped from denying the correctness, accuracy and authenticity of the information they held out as accurate and correct through their official portals.”

38. Additional reliance was placed in H. Young & Co (E.A.) Ltd & 22 others v County Assembly of Machakos & 2 others (2020) eKLR.
39. Owing to these infringements by the respondents, Counsel submitted that the petitioner is indeed entitled to the reliefs sought. On costs, Counsel submitted that the principle is that costs follow the event as was held in Erick Okeyo v County Government of Kisumu & 2 others (2014)eKLR. Similar reliance was placed in Biowatch Trust v Registrar Genetic Resources and others (CCT 80/2008) (2009) ZACC.

Respondents'

1st and 3rd Respondents' Submissions

40. Counsel, Jackline Kiramana on behalf of these respondents filed written submissions dated 5th June 2023 where she sought to discuss whether the petitioner's constitutional rights had been violated. On the issue of violation of Article 40 of *the Constitution*, counsel submitted that the respondents, upon conducting the investigations, including a tape lift of the subject vehicle, concluded that its chassis



number was the same as the one for the 2nd interested party. Further that there was no record of custom duty payment or importation of the subject vehicle whereas there was for KCA 007Y. Equally, that the chassis number indicated in the petitioner's logbook differed from the physical one on the subject vehicle. On the other hand, the petitioner following these discoveries failed to address the disparity in the registration details of the subject vehicle considering the investigations are ongoing.

41. Considering this, Counsel asserted that the petitioner's claim of violation of her constitutional rights is premature and therefore in violation of the doctrine of ripeness. Counsel contended thus that the petitioner was inviting the court to speculate on the outcome of the said investigations and make a decision on the speculations. Reliance was placed in *Wanjiru Gikonyo and 2 Others vs National Assembly and 4 Others*(2016) eKLR where it was held that:

“The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.”

42. Analogous reliance was placed in *John Harun Mwau v AG & 2 Others* of HCCP No. 65 2011 (unreported) and the text in *American Constitutional Law*, 2nd Ed. pp 80-81.
43. Counsel as well noted that contrary to the petitioner's allegations the respondents had conducted their mandate within the law and so the allegation of violation of Articles 47 and 50 of *the Constitution* was premised on a misinterpretation of the law.
44. Considering this argument, Counsel asserted that the petitioner had not met the threshold set in the *Anarita Karimi Njeru vs the Republic* No. 1(1979) KLR 154 since she had not shown how her rights under these Articles had been infringed by the respondents. Accordingly it was argued that the petitioner is not entitled to the reliefs sought.

2nd and 4th Respondents' Submissions

45. Principal Legal Officer, Judith Opili - Sirai for these respondents filed written submissions dated 12th June 2023. On the first issue, Counsel submitted that the petition was in breach of the doctrine of ripeness since the investigations into the matter had not been concluded. It was also emphasized that the investigations were carried out in line with their legal mandate as espoused in law.
46. In support reliance was placed in *Republic vs National Employment Authority & 3 others Ex-parte Middle East Consultancy Services Limited* (2018)eKLR where it was held that:

“The doctrine of ripeness serves the useful purpose of highlighting that the business of a Court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or is generally retrospective; it deals with situations or problems that have already ripened and crystallised, and not with prospective or hypothetical ones.”

47. On whether due process was followed when registering the subject vehicle, Counsel submitted that these respondents' replying affidavit was a testament to the fraudulent registration of this vehicle and its illegal introduction into the system. It followed therefore that the subsequent transfers of the vehicle were illegal. It was stressed therefore that a court cannot enforce an illegality.
48. On the alleged violation of the petitioner's rights, Counsel submitted that the petitioner had not demonstrated with preciseness how the rights had been violated by the respondents as set out in the *Anarita Karimi Njeru* case (supra). Parallel dependence was placed in *Republic vs Truth Justice and*



Reconciliation Commission ex parte Augustine Kathangu (2011)eKLR. Inevitably, it was argued that the petitioner was not entitled to the reliefs sought.

The 2nd Interested Party's Submissions

49. The 2nd interested party through its advocates, Bob Okumu and Company Advocates filed written submissions dated 1st May 2023. Counsel on the legitimacy of the subject vehicle submitted that the vehicle registration was done fraudulently as can be evidenced from the averments deposed in the respondents' affidavits. It was further stated that as per the 2nd and 4th respondent's conclusion in their investigation, the impugned vehicle is indeed the stolen vehicle with registration number KCA 007Y whose registered owner is the 2nd interested party.
50. Counsel on this basis submitted that it was clear that the petitioner herein had not obtained a good title. Accordingly, this Court cannot issue her the orders she seeks. Reliance was placed in the principle of nemo dat which was highlighted in the case of Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019)eKLR as follows:
- “The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”
51. Counsel further submitted that since the key issue being the valid ownership of the subject vehicle had failed to be proved by the petitioner, there was no further constitutional issue to be determined by this Court. Additionally Counsel submitted that the petition had failed to meet the constitutional threshold because the petitioner had merely mentioned provisions of the law but had not demonstrated how those constitutional provisions had been violated. Reliance in this was placed in Mumo Matemo vs Trusted Society of Human Rights alliance (2014)eKLR which reiterated the threshold set in the Anarita Karimi case. Equal reliance was also placed in Christian Juma Wabwire v Attorney General (2019) eKLR.

Analysis and Determination

52. There are only two main issues for determination:
- a. Whether the respondents violated the petitioner's constitutional rights under Articles 40, 46, 47 and 50 of *the Constitution*.
 - b. Whether the petitioner is entitled to the reliefs sought.
1. Whether the Respondents violated the Petitioner's constitutional rights under Articles 40, 46, 47, and 50 of *the Constitution*.
53. The gist of this petition is that the respondents' act of impounding the vehicle violated the Petitioner's right over motor vehicle registration No. KCA 500D. According to the Petitioner, she had innocently bought vehicle KCA 500D from one Mansurali Didarali sometime in August 2018 after duly confirming the ownership registration details from the 4th Respondent's system. However, on 8th May, 2022 the same was impounded by the 2nd Respondent's Officers attached to the 4th Respondent



allegedly on account of a complaint of theft that the 2nd Interested Party had lodged that triggered this turn of events.

54. The contention that she owns the motor vehicle in question was strongly disputed by the Respondents and 2nd interested Party who sought to demonstrate that the Petitioner's claim to ownership of the said vehicle was dubious and therefore could not be protected under *the Constitution* or law.
55. Protection of right to property is provided for in Article 40 of *the Constitution*. Arbitrary deprivation of property or enjoyment of one's property is not permitted under *the Constitution* or under the law. A party alleging deprivation of property however has a duty to demonstrate his or her right to the property in question. In *Edward Akong'o Oyugi & 2 others v Attorney General (2019)eKLR* the Court reasoned thus:

“

“72. Section 107 (1) of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." ... Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd* :-
“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

56. In the instant case, impounding of the motor vehicle in question was necessitated by an investigation into the complaint concerning the validity of the ownership of the said motor vehicle. While the Petitioner alleged that she had purchased the vehicle innocently, the 2nd Interested Party had reported the theft of his vehicle with investigations not yielding any fruits until petitioner said the vehicle was subsequently discovered when 4th Respondent was investigating fraudulent motor vehicle registrations whose duty had not been paid only to find that there was connection between this vehicle and the 2nd Interested party's reportedly stolen vehicle.
57. To succeed in establishing a claim for deprivation of property by the 2nd Respondent, the Petitioner has to demonstrate that in carrying out the mandate given by *the Constitution* and the law, the 1st and 2nd Respondent acted unlawfully and unreasonably in exercising their powers thereby unjustifiably depriving her the right to the enjoyment of the said property which she was lawfully entitled.



58. The 1st and 2nd respondents are part of the National Police Service which is created under Article 243 of *the constitution*. At Article 243 (4) provides: -

“Parliament shall enact legislation to give full effect to this article.”

59. The relevant statutory instrument enacted pursuant to Article 243(4) is the *National Police Service Act* No. 11A of 2011. Under Section 24 of the said Act, the functions of the National Police Service are set out and include investigations, detection and prevention of crimes among many others.

60. The law gives police powers to deal with property that is subject of an investigation. Under Section 26 of the Criminal Procedure Code, the police can detain, search Aircraft, vessel, vehicles and persons if there is reason to suspect the aircraft, vessel or vehicle has been used or employed in commission or to facilitate the commission of an offence. Ideally, the recommended mode of seizure of such property/ items is through a warrant under Section 118 of the Criminal Procedure Code but the police in special cases can do so without a warrant if there are reasonable grounds to believe that that delay occasioned in obtaining a warrant under Section 118 is likely to substantially prejudice an investigation. Section 60 of the *National Police Service Act* No. 11A thus provides: -

1. When a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, is likely to be found in any place and that the delay occasioned by obtaining a search warrant under Section 118 of the Criminal Procedure Code (Cap. 75) will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing.

2. ...

(3) For purposes of conducting a search under this section—

(a) ...

(b) if anything is seized under subsection (1), the police officer shall immediately make a record describing anything so seized, and without undue delay take or cause it to be taken before a magistrate within whose jurisdiction the thing was found, to be dealt with according to the law.”

61. Seizure of property to facilitate investigation into an offence is thus not unlawful and depending on circumstances, it can either be upon issuance of warrant of search and seizure or by police officer without a warrant in special circumstances where it may not be prudent to go through the process of a warrant if has the potential to jeopardize an investigation. The police however are however required to notify a Court in whose jurisdiction the property has been seized at the earliest possible opportunity so that the property can be dealt with.

62. It is thus necessary to interrogate the circumstances of this case and determine if the impounding of the Petitioner’s vehicle by the 2nd Respondent was unlawful.



63. The Respondents and the interested party revealed through the affidavit evidence that Petitioner's motor vehicle had been fraudulently registered by tampering with the details of another motor vehicle that was stolen. According to the Respondents, the Petitioner's vehicle KCA 500D which she claimed she had purchased innocently was in fact originally Motor Vehicle registration number KCA 007Y which was reported stolen at Kiambu Police Station on 2nd April, 2017 at 0015 hours vide OB 02/02/04/2017. Indeed, it was discovered that KCA 500D had chassis number UZJ200-4012968 which belonged to KCA 007Y which also correctly marched with the log-book. On the contrary, KCA 500D which belonged to the Petitioner had recorded a chassis that did not match with what was physically reflected on the motor- vehicle namely chassis UZJ12004012968. Moreover, there was no record of customs payment in respect of motor vehicle KCA 500D but that which was available was got Motor Vehicle KCA 007Y.
64. With these details emerging from the investigations already done of the complaint lodged under OB NO. 02/02/04/2017 lodged by the interested Party Muturi Njoroge it is obvious that the 1st and 2nd Respondent were justified in impounding the vehicle in dispute and preserve it considering that there is prima facie evidence that strongly pointed towards possibility of commission of crime. The Petitioner cannot in the in the light of evidence brought out through the investigations claim that she has unquestionable right to the property in issue until this matter is resolved. To grant the orders sought at this stage in the guise of upholding the rights under Article 40 of *the Constitution* will be premature and will most likely compromise the interests of justice. At the present stage, the facts have not crystallized sufficiently to permit this Court to reach a conclusive decision that the motor vehicle in question undoubtedly belongs to the Petitioner for Article 40 to be invoked to protect proprietary rights in respect of the said vehicle. She thus filed this dispute prematurely.
65. Though *the constitution* in Article 40 protects the right to property, sub-article 6 provides that the protection does not "extend to any property that has been found to have been unlawfully acquired."
66. In view of the glaring facts that demonstrably dent the authenticity of the Petitioner's claim of ownership of the said vehicle, this Court finds it difficult to uphold her proprietary rights deserving to be protected under Article 40. The claim that her constitutional rights to property were violated by reason of seizure of the said motor vehicle seized by the 2nd Respondent's officers is thus unsustainable. The seizure was necessary to give a chance for investigations to be carried out without undue advantage being given to any of the claimants. As was held in *Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others* (2014) eKLR.
- "...The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated".
67. Consequently, I find that the respondents did not act unreasonably or unlawfully in impounding the said motor vehicle.
68. There were also additional claims by the Petitioner to the effect that her consumer rights under Article 46 were violated. The Petitioner did not tender evidence relating to violation of consumer rights hence the claim fails. On the allegation that her right to fair administrative rights was violated, this is difficult to reconcile with her claim that the investigators called her at one time, took time to listen to her point of view and even released the vehicle temporarily to her because the 2nd interested party could not be



traced at the time. It is only after the 2nd interested party emerged that the vehicle was impounded signaling the need for comprehensive investigation. Having been given a chance to give her side of the story her claim that her rights under Article 47 were violated by reason of this investigation is thus untenable.

69. The Petitioner urged this Court to find that the 4th Respondent is culpable for maintaining records which misled her into believing that she was buying the vehicle from a genuine registered owner if her claim to ownership is not upheld. At this stage, the Court would be speculating if it were to reach that conclusion as investigations to determine what happened are still on. It is therefore not possible to make any finding on liability at this point.
70. Further, it is important these investigations be given a chance so that all those that may be complicit within and without can be identified. This cannot be done by giving the advantage to enjoy use of the motor vehicle to petitioner to the detriment of the other part. In making this decision, the Court is also conscious of the other dimensions raised in this matter where other transfers are alleged to have been effected in respect of motor vehicle KAC 007Y when the said vehicle had already been reported stolen. It is thus necessary that the subject vehicle which is in controversy do remain in hands of the investigators in the meantime. They shall make appropriate recommendations for the possible court action upon completion of investigations and eventually, the rightful owner can be determined through the ensuing court process.
71. On the submission by the Petitioner that the 4th Respondent should be held liable for maintaining records that may have misled the Petitioner into believing that she was dealing with a genuinely registered owner when that might not have been so, my take is that such an issue, even assuming that it is the case, does not raise a constitutional question but is a tortious liability claim and under the doctrine of constitutional avoidance, I would hesitate to deal with it as a constitutional question. As was observed in the Ugandan case of *Dr. Willy Kaburuka v Attorney General Kampala HCCS No. 160 of 1993* “...A constitutional Petition cannot be used to circumvent a primary legislation for enforcement of a given right or violation...”
72. For reasons given above, I find no merit in this Petition. I hereby dismiss the same with costs to the Respondents.

Dated, signed and delivered at Nairobi this 20th day of March, 2024.

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L N MUGAMBI

JUDGE

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