



No. 2750

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO. 108 OF 2010

**IN THE MATTER OF CHAPTER 4, SECTIONS 19, 20, 21, 22, 23 AND 40 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CHAPTER 10, SECTION 165 (1, 2, 3, 4) OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE
RULES, 2006 RULES 11-24**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHT AND FUNDAMENTAL
FREEDOM AND BILLS OF RIGHTS**

UNDER CHAPTER 4 SECTION 40 (3) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

**CHELIMO A. MARSIN1st
PETITIONER**

DAVID LANGAT2nd

	PETITIONER	
PAUL RUGUT		3rd
	PETITIONER	
	PAUL	
BILL		4th PETITIONER
	R	
	SAMWEL	
MOSONIK		5th PETITIONER
	STANLEY	
BETT		6th PETITIONER
	RAELI	
MARITIM		7th PETITIONER
	R	
	ALICE	
BETT		8th PETITIONER

AND

THE OFFICER COMMANDING GSU CAMP KIRINDON GSU CAMP		1st
	RESPONDENT	
THE OFFICER COMMANDING GSU CAMP NJIPSIP GSU CAMP		2nd
	RESPONDENT	
THE DISTRICT COMMISSIONER TRANSMARA EAST DISTRICT		3rd
	RESPONDENT	
TRANSMARA WEST DISTRICT		4th
	RESPONDENT	
THE AREA CHIEF IKERING LOCATION		5th
	RESPONDENT	
MICHAEL OLE NGOIN'GONI		6th
	RESPONDENT	
THE OCPD, KILGORIS POLICE STATION		7th
	RESPONDENT	
THE HON. ATTORNEY GENERAL		8th
	RESPONDENT	

JUDGMENT

On 4th November, 2010 the seven petitioners presented this constitutional petition to court. The petition was expressed to be mounted pursuant to articles 19, 20, 21, 22, 23, 40 and 165 of the Constitution of Kenya. The petition was against the eight respondents. In a nutshell one can say that the petition was against the local provincial administration and security agencies for Transmara East and West Districts.

The essence of the petition was that on 12th October, 2010 at 6.00a.m. the 1st to 7th respondents while heavily armed and in the company of several General Service unit (GSU) officers, stormed Kimitet village where the petitioners hail from and forcefully impounded their 77 heads of cattle without any basis or legal justification whatsoever. Thereafter they took the cattle to undisclosed location. The petitioners' several pleas and requests that the respondents return the cattle to them has been in vain and has infact been met with hostilities and violence from the respondents. As a result of the actions of the

respondents aforesaid, the petitioners feel that the respondents have violated Chapter 4, part 1, section 40(3) of the Constitution of Kenya which prohibits the state from capriciously depriving its citizens of private properties without any legal backing or justification. The respondents as agents of the Government are enjoined by the provisions of chapter 4, part 1, section 21(1) of the Constitution of Kenya to ensure that the petitioners enjoy their fundamental rights and freedoms and not to trample upon such rights and fundamental freedoms with impunity. This court has been accorded jurisdiction under chapter 4, part 1, sections 23(1), (2) and (3) and 165 (3) (b) of the Constitution of Kenya to check on such excesses and abuses perpetrated by the powerful state machinery and or organs such as the respondents. The petitioners are apprehensive that they may never recover their livestock unless this court intervenes. The veterinary department had since carried out a valuation of the 77 heads of cattle taken away as aforesaid and concluded that they were worth kshs. 3,400,000/=.

The petitioners therefore prayed that this court issues a declaration that the impounding and or confiscation of the petitioners 77 heads of cattle without following the due process of law, and keeping them in unknown location by the respondents was unconstitutional and violated their rights to property as provided by the provisions of chapter 4, section 40(1) and (3) of the constitution. A declaration that the state had failed to perform its mandatory duty as stipulated by section 21 (1) of the Constitution. The cattle be released to the petitioners forthwith and in the event that they are lost, the state do compensate the petitioners by paying them Kshs. 3,400,000/= being their value thereof and an award of exemplary damages for the unconstitutional conduct of the respondents.

The petition was supported by the affidavit sworn by the 5th petitioner on his own behalf and on behalf of the other petitioners. The affidavit merely reiterated and elaborated on the contents of the petition suffice, however, to add that the ownership of the cattle seized was as follows:-

1 st petitioner	10 Cattle
2 nd petitioner	12 Cattle
3 rd petitioner	8 Cattle
4 th petitioner	24 Cattle
5 th petitioner	5 Cattle
6 th petitioner	5 Cattle
7 th petitioner	11 Cattle
8 th petitioner	2 Cattle

That their joint attempt to have the seized cattle released to them at a meeting with the 1st to 7th respondents aborted when the said respondents were categorical that they were not willing to return the cattle and that in the event that they continued to demand the release, they threatened that they would release the same to unknown person. The petitioners being pastoralists, the unwarranted conduct of the respondents had subjected them to untold miseries and enormous losses as they solely depended on cattle as their source of livelihood and were now faced with starvation. The respondents' conduct amounted to abuse of power and constitutes contempt of the rule of law and human dignity. None of the petitioners had been charged in court in relation to any offence of whatever kind and none of their cattle made subject of investigation or likely to be used as exhibit in any legal process. The respondents' conduct was intended to enrich certain individuals by abusing state power, so as to dispose off the cattle and enjoy the proceeds without following the law. The petitioners had tried everything to secure the release of the cattle but the respondents would not budge thus leaving them with the only option of approaching the court by way of this constitutional petition.

When the petition was served, the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th respondents reacted. On behalf of the 1st, 2nd, 3rd, 5th and 7th respondents, **Gerishon Mbogo Mathioya**, the District Commissioner, Transmara West District swore a replying affidavit. Where pertinent he swore that allegations contained in the petition were not admitted. The petitioners were unknown to the respondents and therefore they were

strangers to their alleged ownership of the cattle and the seizure thereof. They denied that they were in possession of the 77 heads of cattle. However, they were aware that the 6th respondent had in his custody the 77 heads of cattle. Accordingly, the petitioners had not made out a case of violation of any of their constitutional rights against them by the respondents.

On his part, the 6th respondent deponed that he is not a Government employee and therefore had no control, mandate and authority over use or misuse of state machinery, ammunition and armoury. On 9th October, 2010, cattle rustlers of Kipsigis origin, from the neighbouring district, Transmara East, invaded his homestead and stole a total of 170 heads of cattle. Consequently, a search was mounted and 93 heads of cattle were recovered by security officers from both Transmara West and East Districts and returned to him. 77 heads of cattle were however not traced, but the foot prints thereof disappeared at Olgos Sophia area. Kipsigis elders in the area summoned a meeting and deliberated on the issue and agreed that the missing cattle would be replaced in accordance with the Murkan-Kirindon Border peace accord executed by the elders of the two communities. Pursuant to that resolution 77 heads of cattle were restored to the District Commissioners of the two Districts on 12th October, 2010. He denied having seized, confiscated and or forcefully repossessed the petitioners' cattle. Nor was there evidence that the petitioners owned the 77 cattle. The petitioners' intent according to this respondent was to breach or violate the Murkan-Kirindon Border peace accord, which ensures that neighbouring communities, combat cattle rustling and or compensate the adverse community, whenever stolen heads of cattle are not traced. This is an alternative mode of dispute resolution mechanism sanctioned by section 159 (3) of the Constitution. In view of the foregoing, the petition was misconceived. In any event as a private citizen, he was not conferred with any mandate and or authority to observe, respect, promote and or fulfill the fundamental freedoms of any individual under the constitution. That obligation is otherwise conferred on the state. Thus the petitioners were non-suited against him.

When the petition came up for hearing before me on 25th November, 2010, the respective counsels for the parties, **Mr. Otieno, Oguttu** and **Gitonga** agreed to canvass the petition by way of written submissions. Those submissions were subsequently filed and exchanged. I have since read and carefully considered them together with the authorities cited. Prior to this however, the petitioner had sought and obtained leave to file a further affidavit in reply to the 6th respondent affidavit.

In this supplementary or further affidavit, the petitioners swore that much as the 6th respondent claims to be a private citizen he nonetheless personally participated in the operation on 12th October, 2010 in the company of GSU officers. Infact he was the complainant who had alleged that his cattle had been stolen and the confiscated cattle were intended to be handed over to him as replacement of his alleged stolen cattle. It was therefore apparent from the 6th respondent's conduct that he had instigated other respondents to act on the allegation that his cattle had been stolen and he was the intended beneficiary or benefactor who was to reap from the unconstitutional process besides his active participation. The petitioners were not cattle rustlers and no amount of arguments can justify the joint and collective unconstitutional conduct of the 1st to 7th respondents. They were not privy to the theft of the alleged 170 cattle belonging to the 6th respondent, nor Murkan-Kirindo peace accord. They were never parties to the meeting in which Kipsigis elders met and resolved that their 77 cattle be used to compensate the 6th respondent and that decision cannot pass for alternative dispute resolution mechanism. In any event such peace accord is null and void by dint of Article 159(3) (c) of the constitution.

According to the 6th respondent, the issues that arise for determination in the instant petition are three, namely:

- **Whether the petitioners have *locus standi*.**

- **Whether a constitutional petition can be mounted against a private citizen.**
- **Whether the petition discloses any reasonable cause of action against the 6th respondents.**

The 1st, 2nd, 3rd, 5th and 7th respondents and the petitioners did not frame the issues for determination. However, from the pleadings, the issues as framed by the 6th respondent captures the situation poignantly with perhaps additional issues being the remedies available to the petitioners in the event they are successful and costs.

Dealing with the first issue, I have no doubt at all that the petitioners have *locus standi* to mount this petition. They were the owners of the 77 heads of cattle that were forcefully taken away on 12th October, 2010. Much as the respondents claim that the petitioners have not proved ownership of the cattle, there is no contrary evidence rebutting the petitioners averments that they owned the cattle. In any event there are no birth certificates for cattle nor a register of all cattle showing which cow belongs to who. It is, I think, mischievous to advance such an argument. Besides on 25th November, 2010, the respondents attended this court and admitted to having in their possession the 77 heads of cattle and undertook to ensure their safety until the determination of this petition. There is no evidence that other people have since laid claim over the same heads of cattle. The above notwithstanding, it seems that their subsequent admission runs counter to what they had earlier deponed to in their replying affidavit. In the said affidavit, they deponed that they were not in possession of the 77 heads of cattle but they were aware that the 6th respondent had in his custody the cattle. However according to the 6th respondent's replying affidavit, the said cattle were restored to the District Commissioners, Transmara East and West Districts respectively. At the end of the day therefore the cattle are in the possession of the respondents or one of them at least.

How then did these cattle come into their possession? The 1st, 2nd, 3rd, 5th and 7th respondents deny that they commanded, directed or supervised, the storming of Kimitet village and the impounding of the same. As for the 6th respondent, his take was that he was a private citizen with no control over the use or misuse of state machinery nor was he involved in police swoops or security operations, whatsoever that led to the recovery of the stolen heads of cattle and or seizure of the petitioners' cattle. He went on to depon that other than attending the elders meetings, wherein the deliberations concerning the missing 77 cattle were held, he did not seize, confiscate and or forcefully repossess the petitioners' cattle.

What emerges from the foregoing is that the cattle are in possession of the respondents. But the respondents are unwilling to disclose how they came by the same. All of them deny having participated in swoop or operation that led to the recovery of the cattle. That means that though they know how they came to be in possession of the cattle they are unwilling to tell this court how they came to be in such possession. Why is it so? Either all the respondents or some of them are not candid with the court. They know something fundamental which they are unwilling to disclose to court. They must be taken therefore as admitting to what the petitioners have claimed regarding the manner in which their cattle were taken away from them. Of the above options, I think the last one strikes me as more believable. In a nutshell therefore the petitioners have *locus standi* to prosecute this petition by virtue of the fact that the cattle belonged to them. In any event article 22 of the constitution confers *locus standi* to a wider class of persons. Indeed the article is explicit and confers to anybody the right to petition the court when there is violation or threatened violation of constitutional right. Indeed *locus standi* can no longer be used as an impediment towards the mounting and prosecution of a constitutional petition or reference.

However, can the petitioners maintain the petition against a private citizen? The 6th respondent has sworn that he is a private citizen. He is neither employed nor retained by the Government of the Republic of Kenya as a police officer, GSU or an officer in the employ of any state organ or agency. Therefore he had no control, mandate and or authority over use or misuse of state machinery, ammunition and or

armoury. It is instructive that these categorical deposition did not meet with any rebuttal, express or otherwise from the petitioners. If anything the petitioners seem to agree that indeed he is such a private citizen. In their supplementary affidavit all that the petitioners have said on the issue is that such deposition is mischievous and is no good defence in law and cannot be used to violate or abuse the petitioners constitutional rights. Otherwise they personally saw him participating in the forceful taking away of their cattle in the company of GSU officers commanded by 1st and 2nd respondents and that he was the complainant who had alleged that his cattle had been stolen and the confiscated cattle were intended to be handed over to him as a replacement of his alleged stolen cattle. This is all fine. However it is not an answer to his assertion that he was a private citizen. In the absence of evidence to the contrary, I hold that in all these things, the 6th respondent was a private citizen and whatever he did, if at all, did so in that capacity.

The constitution of a country, ours included regulates the relationship between the government and its citizens. It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of rights. Thus it is not the duty of a private citizen such as the 6th respondent to do so. Can then this petition, mounted against the 6th respondent in his capacity as a private citizen succeed? I do not think so. In the case of **Teitiwunnang –vs- Ariong & Others (1987) LRC Const. 517, Maxwell CJ of Kiribati** stated:

“... Dealing now with the question can a private individual maintain an action for declaration against another private individual or individual or individuals for breach of the fundamental rights provisions of the constitution. The rights and duties of individuals and between individuals are regulated by private law. The constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold...”

The above case is on all fours with the circumstances obtaining in this case. Closely related to the above case is the decision from Trinidad and Tobago in the case of **Re application by Bahadur (1986) LRC (Const) 297** in which it was held ***“...The constitution is not a general substitute for the normal procedures for invoking judicial control by administrative action. Where infringement of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution ...”***. That position applies to this case as well. If the petitioners had a claim against the 6th respondent as indeed they do, they should have prosecuted the claim against him privately and outside the constitution. They should have distinguished him from officialdom. Their remedy lay in private law as against him. In this regard therefore I am in total agreement with the submissions by the 6th respondent that the petitioners were non-suited as against him and the prayers sought, not maintainable, whatsoever. An infringement or violation of a constitutional right can only be perpetrated by the state or state organ and not a private citizen against another. As already stated the petitioners’ remedies against the 6th respondent, a private citizen would only be under the private law remedies and not the constitution. I therefore hold and determine that this petition as against the 6th respondent for the aforesaid reasons must fail and it is so ordered. I am not persuaded by the argument by the petitioners that the jurisdiction of this court under the current constitution has also been widened and the scope of the applicability of the constitution widened and the net has been cast wider to deal with all those persons violating the rights of citizens of the country including private citizens. That cannot be the essence of article 20 or 23 of the Constitution. If it was the intention of the constitution that a private citizen can be held to account and be personally liable for the breaches of the Constitution apart from the state and or its organs, then nothing would have been easier than to expressly state so in articles 21, 22 and 23 of the

constitution.

With regard to issue three, it is not denied that all the respondents save the 6th are state agents. It is also not denied that cattle belonging to the petitioners were confiscated. These respondents claim not to have done so. However, as I have already stated elsewhere in this ruling, I am more inclined to believe the story of the petitioners. They had nothing to gain by falsely accusing the respondents. Indeed the respondents admitted when they came to court on 25th November, 2010 that they are in possession of the cattle. However, their affidavit does not say how they came to be in such possession. If anything, they have deponed that the petitioners are not known to them, and the respondents are strangers to their alleged ownership of the heads of cattle and the alleged seizure. They further depone that they are not in possession of the cattle and if anything, they are in the possession of the 6th respondent. The respondents cannot be allowed to blow hot and cold at the same time. Obviously they are not being candid with the court. The only reason why they are behaving that way is their inability to confront and counter the contentions of the petitioners. To my mind therefore these respondents (1st, 2nd, 3rd, 5th and 7th) whilst heavily armed and in the company of several GSU officers under their command, directions and or supervision stormed Kimitet village on 12th October, 2010 at 6.00a.m. and forcefully impounded 77 heads of cattle belonging to the petitioners without any legal basis or justification whatsoever. In the absence of any legal basis for their actions and their failure to return the cattle even after they were notified formally by the advocates of the petitioners that what they were engaged in was an illegality, a breach of fundamental rights of the petitioners and could attract serious legal implications and enormous damages against them, they were unperturbed. The lawyers even went ahead and enclosed a set of this court's decisions dealing with constitutional breaches, to illustrate to them the gravity of their conduct and the likely consequences which may result, still, the respondents played truant. It even appears that the advocates letter emboldened and or incensed them, they became violent against them. The demand letter seem to have even hardened their resolve to perpetuate their acts of abuse of the constitution with impunity. The actions of the respondents were unwarranted and amounted to depriving the petitioners of their property without any legal backing or justification whatsoever. It was unconstitutional as it breached article 40(3) of the constitution. The deprivation of the petitioners of their properties by the respondent as aforesaid cannot be the subject to the proviso to the said article of the constitution. This article of the constitution guarantees every individual right to property and nobody is permitted to deprive another of such property arbitrarily. Besides, it is the duty of the Government to ensure that every citizen of this Republic enjoys his rights to the fullest extent. See articles 19, 20 and 21 of the constitution. The respondents in my view have acted with a lot of impunity and in total disregard of the law and in particular the constitution which they swore to protect and such conduct cannot be tolerated in civilized society in which we live. It is even more disturbing if the violation of the constitution is perpetrated by the very state organs that have been given the duty to maintain, observe and enforce such rights as in this case. With our new constitutional dispensation, there is no room for collective punishment.

If the 6th respondent's cattle had been stolen, it was the duty of the respondents to investigate the complaint, trace the culprits and if successful, arraign them in court. That is the law. The respondent cannot be allowed to bent the law by the use of short cuts and homemade dispute resolution mechanisms that are not supported by the law. Indeed they tend to undermine and violate such law.

From their replying affidavits, the respondents seem to justify their actions on the basis of the Murkan-Kirindon peace accord executed by the Kipsigis and Masaai elders. On that basis, the Kipsigis elders of Kimitet location undertook to replace the 6th respondent's missing cattle. It was in the spirit of that accord that the 77 cattle belonging to the petitioners were restored to the District Commissioners for Transmara East and West respectively. Though the respondents are tightlipped on the process of replacement, it is clear to me that the said cattle was recovered from the petitioners in the manner they have already stated. Murkan-Kirindon peace accord has no force of law. It is not above the constitution of this country, if anything it is null and void by dint of article 159 (3) (a) (b) and (c) of the Constitution. Traditional

dispute resolution mechanism cannot be used to contravene the bill of rights, if it is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the constitution or any written law. Yet this is what has obtained here.

In my view the conduct of the respondents was wholly unjustified. They had no reason(s) to act or behave in the manner they did and failed to redeem themselves even after they had been warned of the obtaining provisions of the Constitution and the consequences of such breaches. In the process they violated with impunity, the petitioners' Constitutional rights enshrined in section 40(3) of the Constitution.

What remedy then is available to the petitioners? Under article 23 (3) of the Constitution, this court in the event of such breach can grant any of the following reliefs

“a. A declaration of rights

b. An injunction

c. A conservatory order

d. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right of fundamental freedom in the bill of rights and is not justified under article 24.

e. An order for compensation.

f. An order of judicial review...”.

In this petition, the petitioners have prayed for a conservatory order, declarations, an order compensation and exemplary damages. A conservatory order was issued on 25th November, 2010. However, before I proceed to deal with the other prayers, I wish to point out that this is not the first of such cases coming out of Transmara area. There have been others before. The administration in these districts are notorious for impounding livestock of citizens and not returning the same to the owners or give any explanation for such unlawful conduct. They may think that, that is the best way of dealing with cattle rustling rampant in the area. However they need to be reminded that the citizens of that area are Kenyans and are subject to the constitution and other laws of Kenya just like any other Kenyan. They cannot be dealt with outside the Kenyan law. The local administration and security agencies thereat cannot be allowed to operate as outlaws and or as gangs of the wild west of the old American movies, nor is the area the last frontier. As **Shields J.** said in **Marete –vs- Attorney General (1987) KLR 692** “...***The constitution of this republic is not a toothless bulldog nor is it a collection of Pious Platitudes. It has teeth and particular these are found in section 84. Both section 74 and 84 are similar to the provisions of other commonwealth constitutions. It might be thought that the newly independent states who in their constitution enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who power...***”. These observations are as true today as when they were made on 29th April, 1987 with only minor amendments to the sections of the constitution quoted to be in tandem with the current constitution. In the premises I do grant prayers (iii), (iv) and (v) of the petition. In the event that the respondents are unable to release the cattle to the petition forthwith, then they will be liable to pay the petitioners the total sum of kshs. 3,400,000/= being the value of the 77 cattle as per the valuation of **Dr. David C. Towett**, District Veterinary officer, Transmara East District dated 26th October, 2010 and tendered in evidence. Further in the event that the respondents are only able to release to the petitioners some of the cattle, those missing will be valued on the basis of the same report and the amount paid to the respective petitioners as per the details of their cattle set out in paragraph 5 of the supporting affidavit

sworn by 4th respondent on 3rd November, 2010.

How about damages? The petitioners in their submissions have prayed for both general and exemplary damages. However it should be noted that in their petition, they only prayed for exemplary damages. Parties can only get what they have asked for if successful. The petitioners did not ask for general damages. It follows therefore, that, that claim does not fall for consideration.

With regard to exemplary damages it has been held in **Rookes –vs- Banard (1964) A.C 1129** that “... **Exemplary damages are awardable, interlia, where it was shown that there has been oppressive conduct by the Government servants which includes oppressive arbitrary or unconstitutional action by Government servants...**”. This petition is a classic example of all that has fallen from the above authority. Here is a situation where the respondents acted with extreme callousness and great impunity. They were even forewarned by the petitioners’ advocates that their actions were unconstitutional and that they should return the cattle they had confiscated forthwith. They refused to listen. The petitioners are from pastoralist community. They value cattle. Indeed their livelihood revolves around livestock. The respondents have deprived them of their sole source of livelihood. This has been going on for six months plus now. The petitioners have thus been exposed to extreme hardship. I think that there is every reason for the petitioner to be granted exemplary damages sought. In their written submissions they have prayed for kshs. 500,000/= each. The respondent did not address the issue in their submissions. Doing the best I can in the circumstances and weighing one thing against the other, I think that a sum of kshs. 200,000/= to each petitioner as exemplary damages will suffice.

In the end I have made the following orders in this petition.

1. The petition is dismissed as against the 6th respondent with no order as to costs.
2. As against the remaining respondents’ prayers iii, iv, v and vi in the petition are granted.
3. Exemplary damages in the sum of kshs. 200,000/= is awarded to each petitioner.
4. The petitioners shall have the costs of this petition.

Judgment dated, signed and delivered at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE