



**Asudi v Mworira & 5 others (Constitutional Petition 15 of 2022)
[2023] KEHC 18033 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CONSTITUTIONAL PETITION 15 OF 2022**

REA OUGO, J

MAY 31, 2023

**IN THE MATTER OF ARTICLES 22 & 23 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 10,
24, 35, 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA**

BETWEEN

RICHARD OTIENO ASUDI PETITIONER

AND

JASON MWORIA DCIO CENTRAL DIVISION, NAIROBI 1ST RESPONDENT

**CPL. PETER SAWE CENTRAL POLICE STATION, NAIROBI 2ND
RESPONDENT**

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

NATIONAL POLICE SERVICE 5TH RESPONDENT

MWANANCHI CREDIT LIMITED 6TH RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 27th October 2022 which sought the following orders:

a. Spent



- b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to order that the 2nd, 3rd and 4th Respondents to immediately furnish the Applicant with an excerpt of the Occurrence Book and Witness Statements that gave rise to the raid on the Applicant's home and detention of his Motor Vehicle Registration Number KBX 005L Toyota Land Cruiser.
 - e. That pending the hearing and determination of the Petition herein, the Respondents herein be restrained by way of a temporary injunction by themselves, their agents, servants, assigns and/or any other person action on their behalf from detaining, selling, auctioning, disposing of, advertising for sale or in any way divesting and/or interfering with the Applicant possession of Motor Vehicle Registration Number KBX 005 Toyota Land Cruiser.
 - f. That this court be pleased to issue any other order or further orders as it deems fit to issue in the circumstances.
 - g. That costs of the application be provided for.
2. The Application was brought under Article 19, 22 and 23 (1) of the Constitution of Kenya and Rules 23 and 24 of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Application was based on the grounds on the Supporting Affidavit sworn by Richard Asudi Otieno on 27th October 2022.

The Applicant's Case and Submissions

3. It was the Applicant's case that he is the *bona fide* owner of Motor Vehicle Registration No. KBX 005L Toyota Land Cruiser having duly purchased and took possession of the same as the highest bidder at the fall of the hammer at a public auction on 12th August 2022. The auction was carried out following an advertisement published in the Star Newspaper on 4th August 2022 by Jenks Auctioneers. The applicant prior to the auction conducted his due diligence and ascertained that the sale was pursuant to warrants of attachments and sale issued by the High Court in Bungoma Election Petition No. 2 of 2017; Suleiman Kasuti Murunga v IEBC & 2 others Election Petition No. 2 of 2017. Therefore, at the fall of the hammer he was an innocent purchaser for value without notice and as such acquired a good title. On 21st October, 2022 while he was out of town on business the 1st respondent sent the 2nd respondent to the applicant's private residence. They forcibly gained entry and towed away the vehicle on grounds that it had been stolen from the 6th respondent. He instructed his advocate to ascertain the reason for the respondent's action and was informed that the vehicle was detained on account of a false report of theft made by the 6th respondent. They have written to the 1st respondent demanding the release of the vehicle and to be furnished with excerpts of the occurrence book or witness statements that gave rise to the respondents' actions.
4. The applicant was of the view that the 6th respondent was always aware of the impending sale by way of public auction and did indeed make attempts unsuccessfully vide Bungoma CMCC No E 263 of 2022; Mwananchi Credit Limited v Jenks Auctioneers & another to stop the sale of the vehicle but the suit was dismissed on account of lack of jurisdiction. Under Order 22 Rule 65 & 66 of the Civil Procedure Rules 2010 a *bona fide* purchaser for value without notice acquires a good title. The applicant had taken possession of movable property bought in the auction. The respondents therefore violated his constitutional rights to enjoy his property contained in Article 40 of the Constitution which protects him against arbitrary deprivation of property.



5. The applicant in their submissions identified the only issue for determination as: whether the applicant has met the requirements for grant of orders of a temporary injunction. They relied on the case of [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR where the court held as follows:

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1) whether the applicant has demonstrated a prima facie case with a probability of success.
- 2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.
- 3) Where the balance of convenience tilts if the court is in doubt.

....

A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed... Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient... The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed.

6. The applicant in his submissions point out that a certificate of costs assessed at Kshs. 3,635,440/- was issued by the court in Election Petition No 2 of 2017; [Suleiman Kasuti Murunga v Didmas Wekesa Barasa alias Didmas Mutua](#). Following non-payment, the motor vehicle was proclaimed on 16th March 2022 and attached on May 2022. Barely one month after the attachment, on 8th June 2022, the said judgment debtor, proceeded to acquire a loan facility of Kshs 700,000/- from the 6th respondent offering the vehicle as collateral. The applicant submits that the vehicle was placed under custody of the law and court through the auctioneer on 16th March 2022 thus the vehicle was not available to be charged. In any event, the 6th respondent has failed to provide evidence to show how much money is due and outstanding. He relied on the provisions of Order 22 Rule 65 and Rule 66 (1) of the [Civil Procedure Rules](#) which provide as follows:

65. Irregularity not to vitiate sale, but any person injured may sue [Order 22, rule 65.]
- No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.
66. Delivery of movable property, debts and shares [Order 22, rule 66.]
- (1) Where the property sold is movable property of which actual seizure has been made, it shall be delivered to the purchaser.



7. The issue surrounding the auction is civil in nature and there has been no explanation given justifying the involvement of the police. Efforts to get the excerpt of the occurrence book have been frustrated by the 1st and 2nd respondents. He claims that the 6th respondent is using criminal means to settle civil claims and cited the case of *Republic v DPP & 3 others Ex-parte Bedan Mwangi Nduati & another*; Judicial Review No 322 of 2014. The applicant claims to have proved all ingredients for the grant of temporary injunction and that the release of the vehicle to the applicant carries a lower risk of injustice. In any event, the 6th respondent has not provided proof of indebtedness while there is evidence that the applicant spent Kshs 2,500,000/- towards the purchase of the vehicle.

The 6th Respondent's Case and Submissions

8. The application was opposed by the 6th respondent who filed its replying affidavit sworn its head legal department, Sylvia Wanjiru Njoroge. According to the 6th respondent, sometimes in June 2022, the 6th respondent advanced a credit facility to Suleiman Kasuti Murunga who in turn charged the suit motor vehicle in favour of the 6th respondent as collateral for the loan facility and parties subsequently caused the vehicle to be registered in both their joint names. The 6th respondent is therefore the legal and lawful owner of motor vehicle reg. no KBX 005L and it is duly registered as a joint proprietor alongside Suleiman Kasuti Murunga. The 6th respondent came to learn that Suleiman Kasuti Murunga was a party to *Election Petition No 2 of 2017* at Bungoma High Court. Pursuant to the court's decree Suleiman Kasuti Murunga was liable to pay a sum of Kshs 3,645,440/- as costs of the petition and as a result warrants of attachment and sale against his movable property were issued in order to satisfy the decree. The litigants in the aforesaid petition instructed Jenks Auctioneers to attach and sale movable property of Suleiman Kasuti Murunga. The auctioneers attached and purported to sell through public auction the suit motor vehicle on 12th August 2022 without conducting due diligence. The auctioneer had no right to sell the vehicle as it was jointly registered in the name of the 6th respondent and Suleiman Kasuti Murunga. Order 22 Rule 65 and 66 of the *Civil Procedure Rules* are meant to protect a purchaser in a public auction from irregularity by the auctioneer when selling the property of a judgment debtor. However, it cannot be forcefully be used to deprive third parties such as the 6th respondent its lawfully obtained property when it is a stranger to the litigation where the decree arose as this violates the 6th respondent's right under Article 40 of the *Constitution*. In any event, the applicant is not a *bona fide* purchaser for value as he admitted to being aware of the 6th respondent's legitimate claim over the suit vehicle. The 6th respondent has also denied that it used the police as its own hired gun as it has no control over the police and how they perform their duties.
9. In any event, the 6th respondent has instated a suit against Jenks Auctioneers which purported to sale the suit vehicle and the applicant is joined therein as an interested party. The petition before the court is premature as the rights of parties herein in respect to the suit motor vehicle are yet to be determined in Civil Suit No 5358 of 2022 in Milimani. The court in CMCC No 5358 of 2022 have issued orders to preserve the subject matter of the suit hence the order now sought by the applicant to have the vehicle released to him is meant to circumvent the orders of the lower court. The application dated 27th October 2022 does not meet the threshold for the grant of any interim injunctive orders as they were set out in the *locus classicus* case of *Giella v Cassman Brown* and should be dismissed with costs.
10. The 6th respondent in its submissions argue that the applicant has failed to prove a case with a probability of success that it is entitled to ownership and possession of the subject motor vehicle. The lawfulness of the sale of the vehicle in public auction is subject of active litigation in Milimani CMCC No 5358 of 2022 in which the court has issued an order for preservation of the vehicle. The court should therefore defer the issues raised in the application and the main petition to the lower court



which is seized with the jurisdiction and competence to determine it as the issue is purely a civil one and devoid of any constitutional question. He relied on the decision of the court in *Harrikson v Attorney General of Trinidad and Tobago* [1980] AC 265 where the court observed:

“The notion that whenever there is a failure of any organ of a government, a public authority or public officer to comply with the Law, this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals under Chapter 1 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 freedoms is or is likely to be contravened, is an important safeguard of those significant freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicants has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexation or an abuse of the process of the Court as being more solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom”.

ANALYSIS AND DETERMINATION

11. The 6th respondent has challenged the jurisdiction of this court to entertain the application and petition arguing that the matter before this court is a civil matter. The 6th respondent further contends that the lawfulness of the sale of the vehicle in public auction is subject of active litigation in Milimani CMCC No 5358 of 2022. Therefore, at the onset I will consider if this court is clothed with the jurisdiction to entertain the applicant’s suit. The Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR stated:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.”

12. It is not in dispute that the main dispute in this suit revolves around sale of Motor vehicle registration number KBX 005L Toyota Land Cruiser in satisfaction of a court’s decree. The main issue touches on the legality of the auction and calls for the ascertainment of who the owner of the suit motor vehicle is. Therefore, the key inquiry at hand is whether there is an established dispute resolution mechanism with the capability of addressing the concerns presented in this application as well as the Petition. The issue at hand is matter that is guided by the provision of the *Civil Procedure Rules* and at the core of the applicants submissions are the provisions of Order 22 rule 65 and 66 of the *Civil Procedure Rules*. The court in *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling) held that every legal dispute is capable of either direct or indirect application of the Bill of Rights, however, the supremacy of the *Constitution* does not detract from the usefulness of the rest of the body of law. The court further stated:

The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court



stated in *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (*supra*) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in *Ashwander v Tennessee Valley Authority*²⁰ the U.S. Supreme Court 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. 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 on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.

13. In this case, it has not been disputed that the issue in dispute has been raised in a civil court in Milimani CMCC No 5358 of 2022 and is pending the court's determination. The applicant did not dispute that there were orders that have been issued in Milimani CMCC No 5358 of 2022 to preserve the subject of the litigation, that is, the suit motor vehicle. Therefore, it would be prudent for this court to apply the doctrine of avoidance and decline to consider any of the issues touching on ownership and legality of auction of Motor vehicle registration number KBX 005L Toyota Land Cruiser where there is another mechanism through which the dispute could be resolved and the same has been invoked.
14. The only issue that remains for determination is the question of whether the applicant has proved his case on access to information. The governing law is the *Access to Information Act* ('the Act'). Section 8 of the *Act* requires the applicant to make an application to access information providing details and sufficient particulars for the public officer to understand what information is being requested. The application must be made in Kiswahili or English. The applicant has presented sufficient evidence that through his advocate wrote to the 1st respondent requesting to have an excerpt of the occurrence book and witness statement. The applicant's request for information elicited no response from the respondents. The applicant did not receive any response to their letters. What recourse is therefore available to the applicant at this point? Section 14 of the *Act* provides that the applicant was required to make an application in writing to the Commission on Administrative Justice requesting a review of the decisions of a public entity in relation to a request for access to information. It provides as follows:

“ 14.(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

 - (a) a decision refusing to grant access to the information applied for;”
15. The Act therefore provides a clear procedure for redress in the event the applicant is denied the information he applied for. The applicant has not exhausted the procedure laid out in the *Access to Information Act* for redress of such disputes. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others* (Interested Parties) (2020) eKLR. The Court stated as follows: -
 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion



doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

16. It is clear from the foregoing that the dispute raised by the applicant can be properly dealt with before other forums, that is, the Civil Court and the Commission on Administrative Justice. Accordingly, I find this application devoid of merit and same is hereby dismissed. The 6th respondent is awarded costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF MAY, 2023.

R.E. OUGO

JUDGE

In the presence of:

Ms Umazi h/b Mr. Walukwe For the Petitioner/Applicant

Mr. Bolowa h/b Mr. Khaemba For the Respondent

Wilkister C/A

