



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION CASE NO. 39 OF 2017

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

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IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

&

IN THE MATTER OF VIOLATION OF THE RIGHTS TO A CLEAN AND

SAFE ENVIRONMENT UNDER ARTICLE 42 OF THE CONSTITUTION

&

IN THE MATTER OF VIOLATION OF THE FREEDOM OF ASSOCIATION

UNDER ARTICLE 36 OF THE CONSTITUTION OF KENYA, 2010

&

AND IN THE MATTER OF THE RIGHT TO PROPERTY UNDER

ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

EVA NYAWIRA WAHEIRE.....PETITIONER

VERSUS

PETER MURIUKI, PERIS MWANGI AND GEORGE GITUKU (*Being sued as officials of*

FOREST COURT WELFARE ASSOCIATION MEMBLY PARK ESTATE....1ST RESPONDENT

SECURITY GROUP AFRICA LIMITED (SGA).....2ND RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....3RD RESPONDENT

JUDGMENT

1. **EVA NYAWIRA WAHEIRE** the petitioner filed a petition dated 31st October, 2017. The petitioner filed a notice of Motion application dated 6th June, 2018 seeking amendment of that petition. The draft amended petition was annexed to that application. My perusal of the court proceedings of this matter however reveal that the court to date has not granted the petitioner leave to amend her petition. It follows

that, although parties in their written submissions addressed the draft amended petition, leave to amend the petition having not been granted this Court shall restrict itself to consideration of the petition dated 31st October, 2017.

2. The background of this matter is that the petitioner is an owner of property **L.R. 20728/242 Membly Park Estate Phase II, Forest Court** in Ruiru Town. The land in that Membly Park Estate Phase II (hereafter the subject property) was subdivided into ¼ acre. Those plots of land were sold exclusive of development.

3. The residents of the subject property formed an association called **FOREST COURT WELFARE ASSOCIATION MEMBLY PARK ESTATE**. There is a certificate of registration issued by Ruiru sub-county dated 15th March, 2016 evidencing the registration of the association. The association is sued in this action through its officials as the 1st respondent.

4. According to the association officials, the subject property was porous and there were frequent cases of trespass from non-residents persons which increased cases of insecurity and consequently the residents pooled resources together and fenced the entire perimeter was of the Forest Court. In constructing that wall, there were provided two gates for access to the court. Those gates are manned by security guards from the **Security Group Africa Limited (SGA)** the 2nd respondent in this petition. The officials of the association deponed in their affidavit that the association undertook numerous development within the subject property. As a result of those improvements, the residents agreed to remit to the association Kshs.2,500/= per month.

5. The association has Bylaws. The main goal stated in those Bylaws is set out in **Article 2** of the same, that is:-

“The neighbourhood Association will be a non-partisan, neighbourhood and community-focused group, committed to build safer, more caring neighbourhood and improving the quality of life in the community.”

6. The Bylaws further provides:-

“... each member shall be expected to sign of acceptance to the terms of these bylaws...”

All the members of the court will make monthly contribution towards security service provision...

Failure to pay security fees will mean that you stop enjoying the conveniences ...

Failure to pay the security fees will therefore mean that one will therefore be required to open the gate for yourself.”

7. The association’s official further deponed that as is the practice in other estates:-

“any resident who voluntarily withdraws from remitting monthly contributions supporting the affairs of the estate but continues to enjoy the infrastructure provided by other residents is required to take care of his/her own security, garbage collection and any other services offered.”

PETITIONER’S CASE

8. The petitioner, by her petition stated that the association without notification or consultation converted, the area where her property is located into a gated community. That this action by the association led to closure of public access roads and erection of gates which are 500 metres away from her residence. That the association contracted (SGA) to provide 24 hour security at the gates. That thereafter, the association “started making demands” which the petitioner, by her pleadings, termed as “harassment” to her. That when the petitioner declined to be a member of the association and did not comply with demands made by the association that it was then that violation of her constitutional rights commenced.

9. The violations as pleaded by the petition are as follows:-

VIOLATION OF THE PETITIONER’S CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS

1. PARTICULARS OF VIOLATION FO THE PETITONER’S RIGHT TO BE TREATED WITH INHERENT DIGNITY AND FREEDOM FROM DISCRIMINATION

(a) *The petitioner has frequently been embarrassed and humiliated before her family members, friends and visitors.*

(b) *The petitioner’s moral standing and dignity has completely been lowered amongst area residents.*

(c) *The petitioner’s image and personal reputation have been seriously injured.*

(d) *The petitioner’s name has been tarnished and her character unnecessarily been assassinated.*

(e) *The petitioner has on several occasions ben physically assaulted by members of the said Forest Court Association.*

2. PARTICULARS OF VIOLATION OF THE PETITIONER'S FREEDOM OF ASSOCIATION

- (a) The petitioner's constitutional right and freedom of association with persons of her choice has been infringed by being forced to be a member of an association she does not approve of.*
- (b) The petitioner has been forced to make payments to an association she does not subscribe to.*
- (c) The petitioner has been illegally forced and intimidated to abide by regulations of an association she does not approve of.*

3. PARTICULARS OF THE VIOLATION OF THE PETITIONER'S RIGHTS TO PROPERTY AND RIGHT TO A CLEAN AND SAFE ENVIRONMENT

- (a) The petitioner's right to peaceful and quiet enjoyment of her property has been violated.*
- (b) The petitioner and family members have been forced to undergo untold fear and anguish for lack of protection and security of their property rights.*
- (c) The petitioner has been forcefully compelled by the officers of the 2nd respondent to open the gate by herself while they open for other residents discriminating against and causing her extreme embarrassment.*
- (d) The 2nd respondent officers have further closed the way for the petitioner and her family members from ingress and egress and are forced to use unsuitable and back door entrance to access the house and as a result covering a long distance.*
- (e) The respondents have been heaping garbage outside the petitioner's gate and application of mud to the petitioner's gate on several occasions.*
- (f) The respondents have been vandalising water meter and pipes hence cutting supply of water to the petitioner's residence apparently to intimidate her to abide by their by-laws.*

10. The petitioner's prayers are for permanent injunction to restrain the respondents from compelling the petitioner from being a member of the association, from compelling her from contributing from the services SGA and for an injunction restraining the respondents from interfering with petitioner's rights to property rights, which include free access and exit from her property; and for an order directing the respondent to create a convenient route for the petitioner and her family; and an order for compensation to the petitioner by the association and SGA for violation of her constitutional rights.

THE 1ST AND 2ND RESPONDENT'S CASE

11. The association denied coercing the petitioner to join the association. The association by its replying affidavit deponed that as the residents increased, there grew a need for a more organized security system to be put into place and it was with the residents' concurrence and with their contribution that SGA was engaged to provide day and night security. That the association was formed to achieve the following objectives:-

- a) Promoting the health and well-being of the residents of the areas.*
- b) Involving local people in improving the area.*
- c) To carry out and promote both environmental improvements and practical conservation within the court.*
- d) Promoting sport, community recreation and play facilities.*
- e) To control and approve all developments within the Court.*
- f) Maintain enhance security and safety within Forest Court.*
- g) Improve Forest Court including, housing, environment, facilities, community spirit and services for all residents.*
- h) Develop the Forest Court Strategic Plan.*
- i) Organize meetings, training courses and events.*

12. The association by its replying affidavit stated that the petitioner has continued to benefit from all the facilities and activities of the association but has refused to be part of the association. The association denied that the petitioner has been refused access into the subject property and it denied there has been compulsion to have the petitioner join the association. That the petitioner ceased participating in the association's activities and her decision is respected.

13. The association further deponed that, to the contrary, it was not the petitioner who was harassed but it was the petitioner who intimates the security personnel and assaulted a security officer which led to her, the petitioner being charged with a criminal offence of assault. That the petitioner has severally attempted the cause discard within the association and has embarked on malicious acts against members of the association. The officer of the association deponed:-

“The 1st respondent denies that mud has been applied on and/or garbage piled outside the petitioner’s gate and the petitioner’s assertion are untrue, misleading and in any event unsupported. On the contrary, the 1st respondent avers that the petitioner has in the past conducted herself in the most unbecoming and repulsive uncivil manner by carrying human waste in her car and smearing the gates with the same.”

14. The respondent therefore deponed that the petitioner had failed to prove any constitutional violation.

ANALYSIS

15. The Constitution of Kenya 2010 is bold and robust and the previous strictures on standing remedies were done away with by it. This is what the Court of Appeal in the case **COI & ANOTHER VS. CHIEF MAGISTRATE UKUNDA LAW COURTS & 4 OTHERS (2018) eKLR** stated thus:-

“1. The Constitution of Kenya 2010, unlike our previous one, enshrines a detailed, liberal and robust Bill of Rights. Additionally, the strictures on standing and remedies capable of being issued for violation and/or enforcement of the fundamental freedoms and rights thereunder, which were present in the former constitutional order, are no more. This constitutional milestone was aptly set out by this Court in ATTORNEY GENERAL VS. KITUO CHA SHERIA & 7 OTHERS [2017] eKLR as follows:-

“On the application of the Bill of Rights, Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons... It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts ... are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom.”

16. By this petition the petitioner has pleaded that her right to human dignity freedom from discrimination, her right to freedom of association and her rights to property have been violated.

17. The right to human dignity is preserved by protecting human rights and fundamental freedoms. That right is indeed the foundation of other rights. This is what was stated in the case **MUTUKU NDAMBUKI MATINGI VS. RAFIKI MICROFINANCE LIMITED (2012) eKLR** as follows:-

“50. As regards the right to dignity, in AHMED ISSACK HASSAN VS. AUDITOR GENERAL [2015] the Court held that:

“...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”.

See **FRANCIS CORALIE MULLIN V ADMINISTRATOR, UNION TERRITORY OF DELHI (1981) SCR. (2) 516. P**

51. As expressed by Albie Sachs in *The Strange Alchemy of Life and Law (OUP) at page 213:*

“Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the “haves” can continue to have, but to help create conditions in which the basis dignity of the “have nots” can be secured ...”

18. The petitioner has alleged that her right to be treated with dignity was violated by the respondents. I reproduced the violations the petitioner alleges herein above in this judgment.

19. The petitioner in bringing this action had a burden to prove violations of her Constitutional rights by the respondents. She had a burden to prove the alleged violations of rights and freedoms. The petitioner had an onus to show on *prima facie* basis violations of constitutional rights. This is in keeping with the provisions of **Section 107 and 108** of the Evidence Act. See the case **BENARD MURAGE VS. FINESERVER AFRICA LIMITED (2015) eKLR** as follows:-

“In the case of JOHN HARUN MWAU & OTHERS V THE ATTORNEY GENERAL (supra), it was observed that the jurisdiction vested in

the High Court to interpret the Constitution is not exercised in a vacuum; that there must be a real controversy or dispute between parties before the Court in order for it to exercise its jurisdiction. Similar findings have been made in the cases of REV. TIMOTHY NJOYA V ATTORNEY GENERAL PETITION NO.479 OF 2013 and INTERNATIONAL CENTRE FOR POLICY AND CONFLICT 7 OTHERS V ATTORNEY GENERAL PETITION NO.552 OF 2012. It is clear therefore that judicial power will be used to determine actual controversies arising between adverse litigants and that power cannot be exercised in instances where the questions for determination are abstract and hypothetical. To do so would mean that the Court would merely be issuing advisory opinions or be involved in an academic exercise at the peril of genuine litigants who have clogged the judicial system with genuine cases for determination.”

20. It is also useful to bear in mind what was stated by the two bench judges of the High Court in the case ANARITA KARIMI NJERU VS. REPUBLIC [1979] eKLR thus:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

21. How then do the above standards measure up to this case presented by the petitioner? The petition and its supporting affidavit are thin on the evidence of constitutional violation. The petitioner pleaded that she had been embarrassed, her moral standing and dignity had been lowered. The petitioner fails to give particulars of those alleged wrongs. She fails to plead what form those violation took and failed to specify who amongst the respondents breached her rights.

22. The petitioner alleges she was being coerced to join the association but fails to state what form of coercion was applied by who specifically. The petitioner alleges that her right to property were violated and particularises that violation by stating that she had been compelled to open the gate for herself while other residents have the gate opened for them.

23. In regard to the latter alleged violation the petitioner has clearly stated that she does not wish to be a member of the association. The evidence produced before this Court shows that the services of security which includes, opening the gate are reserved for those who are members of the association. The holding by Justice Majanja in the case KIRIINYA M. MWENDA VS. RUNDA WATER LIMITED & ANOTHER (2014) eKLR is useful to consider here as follows:-

“The petitioner is not a member of the Runda Association but he is a beneficiary of the common services it provides including security, maintenance and upkeep of the Estate it is not unreasonable for him to pay the fees applicable to all the members of the Association for the services which he receives. To insist that he pays for commons services provided to all residents is not a violation of his freedom of association protected under Article 36 of the Constitution.

.... I wish to point out that the petitioner’s right to own, use and develop his property is not absolute. He lives in a community of other property owners who have voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life by making provisions for certain services. The Petitioner as a resident of the area cannot insist on exercising his rights without regard for the rights of others and or benefit from services without paying for them”.

24. The petitioner not only has failed to show how opening the gate for herself since she does not subscribe to the association, violates her constitutional right but she needs to be reminded that she resides in a community, in this case Forest Court, and that requires that she abides by common rules which apply to all other residents. To require her to so abide, is not a violation of her rights at all. If however the petitioner refuses to abide with those rules, the association has every right to withhold any privilege associated with membership to the association.

25. The claims of assault by the petitioner should be referred to the police for their action.

DISPOSITION

26. I do indeed, find as stated above that the petition was not pleaded with precision and that the petitioner failed to prove violation of her constitutional rights. Accordingly, the petition fails and is dismissed with costs to the 1st and 2nd respondents.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 31ST MARCH, 2022.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: MOURICE

FOR PETITIONER : N/A

FOR 1ST & 2ND RESPONDENT : MS. ODHIAMBO H/B MR. KABAICO

FOR 3RD RESPONDENT : N/A

COURT

JUDGMENT DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE