



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rapha Hospital Limited & another v County Government of Uasin Gishu (Constitutional Petition E004 of 2020) [2022] KEHC 16813 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16813 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION E004 OF 2020  
RN NYAKUNDI, J  
DECEMBER 23, 2022**

**BETWEEN**

**RAPHA HOSPITAL LIMITED ..... 1<sup>ST</sup> PETITIONER**

**BENSON KIMEMIA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF UASIN GISHU ..... RESPONDENT**

**RULING**

1. The petitioners approached this court *vide* a petition dated May 19, 2022 seeking the following orders;
  - a. A declaration that the arbitrary removal and destruction of directional signage of the petitioners by the officers, agents, servants and/or employees of the respondent was unconstitutional and a violation of the constitutional rights of the petitioner.
  - b. A declaration that the trial of the 2<sup>nd</sup> petitioner was unconstitutional as it was actuated by malice and was brought under non-existent pieces of subsidiary legislation.
  - c. An order that the respondent compensates the 1<sup>st</sup> petitioner for the amounts specified on paragraphs 4 and 6 of the petition.
  - d. Damages for breach of the petitioners' constitutional rights
2. A brief summary of the facts underlying the petition is that in the year 2017, the 1st petitioner obtained authority from the respondent to erect a road signage along the Eldoret-Malaba Road outside its hospital and on that basis, the 1<sup>st</sup> petitioner commissioned a road signage to be fabricated and erected outside its hospital.
3. In the year 2018, licensing of signage along national roads was taken over by the Kenya National Highways Authority ("KENHA") and it became necessary for the 1<sup>st</sup> petitioner to apply for such



licence from the said KENHA. Vide letter dated March 20, 2018, the KENHA granted approval to the 1<sup>st</sup> petitioner to maintain the signage subject to the terms and conditions contained therein as well as payment of requisite fees.

4. The 1<sup>st</sup> petitioner also paid the signage fee charged by the respondent in respect of the directional signage on the road reserve for the year 2019.
6. The petitioner claims that on April 26, 2019, the respondent through its agents removed and destroyed the signage in utter disregard to the authority given to the 1<sup>st</sup> petitioner by itself and the Kenya National Highways Authority. The petitioner was arrested by agents of the respondent and charged in court in Eldoret Criminal Case No 1407 of 2019 when he sought to enquire about the removal of the signage.
7. The petitioner then approached this court seeking the aforementioned orders.

### **Petitioner's Case**

8. The petitioners' case is that the arbitrary removal of road directional signages along the Eldoret-Nakuru Highway by the respondents constitute a violation of their rights under the Constitution of Kenya 2010. They submitted that the respondent's action to destroy the directional signage without any information or notification to the petitioners is a clear violation of article 1(1), as the state power, the basis of which such action might be undertaken was not exercised in accordance with the Constitution. The petitioners are aggrieved that the respondent abdicated its obligation in article 3(1) to uphold and defend the Constitution by destroying the directional signage of the 1<sup>st</sup> petitioner even where the 1<sup>st</sup> petitioner has or had valid and the lawful authority to erect and maintain the signage, and the respondent had received payment of the signage fees in respect of the 2019 year.
9. The respondent violated the right to property of the petitioner protected under article 40 of the Constitution, which allows every person to acquire and own property of any description and in any part of Kenya. The authority to erect the directional signage obtained by the petitioner constituted a license in property law, which can only be interfered with in accordance with constitutional provisions. Unilateral acts of removal and destruction of directional signage, without notice, information or an opportunity to be heard where the license and signage fees have been paid for, constitutes an unconstitutional interference with the right to property.
10. The removal and destruction of the directional signage by the respondent without notice information or a chance to be heard afforded to the petitioner constitutes a violation of the right to fair administrative action protected under article 47 of the Constitution. The petitioner is entitled to expeditious, efficient, lawful, reasonable and procedurally fair administrative action, and none was afforded in the process of removal and destruction of directional signage.
11. article 50 of the Constitution protects the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body. Where the respondent was aggrieved, if at all, it had the right to institute appropriate legal proceedings for the removal of the directional signage, but unilateral self-help acts of undertaking removal and destruction without notice, information or an opportunity to be heard afforded to the other party is an affront to the right to a fair hearing.
12. Under schedule 4 of the Constitution, part 1, paragraph 18 thereof, national trunk roads are under the purview of the National Government and not County Governments. The body with authority over the Eldoret-Malaba Road is KENHA. This is made clearer under section 4 of the Kenya Roads Act No 2 of 2007, as well as paragraphs 3 and 4 of the Kenya Roads (Kenya National Highways Authority (Vesting) Order, 2011 [LN 193/2011.]



13. Despite the respondent usurping KENHA's statutory role and acting without requisite powers, when questioned about their illegal actions, the respondent resorted to arresting and charging the 2<sup>nd</sup> petitioner with fabricated charges with sole intention of silencing his voice and quest for justice. The illegal actions of the respondent were at best a violation to the petitioners' right to property contrary to the provisions of article 40 of the Constitution.
14. The petitioner prayed that the declarations sought in the petition be allowed as prayed.

### **Respondent's Case**

15. The respondent opposed the petition and submitted that the petition ab initio lacks merit and its filing before this court is abuse of court process and ought to be dismissed for lack of substance and/or merit. It is the respondent's submission that the County Government did not in any way violated the petitioners' constitutional rights, and that such allegations have neither been demonstrated nor proven by the petitioners.
16. The respondents did not participate in the alleged removal and destruction of the petitioners' signage. Furthermore, in the above-mentioned filings, the petitioners have provided neither documentation nor proof that the respondents removed and destroyed their signage. It is a well settled principle that the burden to prove rests on the party alleging. In this case, the petitioners have failed to prove that the respondents were responsible for the alleged removal and destruction of the signage. It cited section 107 and 108 of the Constitution in support of these submissions.
17. The mandate to regulate and authorize the signage such as the one put up by the petitioner's rests with KENHA. It is evident that the removal, if any, would have been within the mandate of KENHA, who routinely who were clear all the obstructions along the major highways in the county. It is the respondents' position that due to the fact that the respondents are not the correct parties to this suit, that the matter be dismissed with costs to the petitioners.
18. It is the respondent's contention as captured in the replying affidavit that there is no evidence of the 2<sup>nd</sup> petitioner's arrest and subsequent prosecution in the Chief Magistrate's Municipal Court Eldoret Criminal Case No 1407 of 2019 (Republic v Benson Kimemia) for allegedly obstructing officers of the respondent. If the 2<sup>nd</sup> petitioner was indeed arrested and prosecuted there is no indication that the occurrence had any relation to this matter whatsoever.
19. The respondent prayed that the petition be dismissed for lack of merit with costs to the petitioners.

### **Issues for Determination**

20. Upon considering the pleadings and submissions by both parties' advocates, the issues emerging for determination are as follows;
  - a. Whether the respondent violated the constitutional rights of the petitioners
  - b. Whether the petitioner is entitled to the orders sought

### **Whether the respondent violated the Constitutional Rights of the petitioners**

21. It is trite that he who alleges must prove. This being a constitutional petition, it is imperative that the court set out the threshold required for a constitutional petition to succeed. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR provided the standard of proof in constitutional petitions.



The Court of Appeal judges stated;-

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, MR said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19,20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent...”

22. The petitioner is required to set out the violations with a reasonable degree of precision in order for the court to establish whether indeed there have been any violations.
23. The petitioner contends that the cause of action that the violations stem from the removal of signage that had been fabricated and erected outside its hospital after paying the requisite signage fees to the respondent.
24. Whereas it is clear that there was damage caused to the signage, and that the petitioner had paid requisite signage fees for the year 2019, there is no evidence on record showing the nexus between the act of destruction and the respondents.
25. I am inclined to agree with the respondents that they are non-suited as the signage was on the Eldoret Malaba Highway which is under the Kenya National Highways Authority’s responsibility. A reading of section 4(b) of the *Kenya Roads Act* reveals that the mandate of controlling national roads and reserves and access to roadside developments is within the purview of the Kenya National Highways Authority, and not the respondent herein.



26. Therefore, despite the petitioner setting out the actions that amount to violations clearly, there is no evidence that the actions resulting in said violations were as a result of the respondents' action. The allegation that the 2<sup>nd</sup> petitioner was arrested and prosecuted by the respondents has not been proved either. There is no evidence that there was a trial or that he was arrested other than the claim that the proceedings are contained in the annexures to the supporting affidavit. I have perused the record of the court and there is no BM6 as claimed in said affidavit.
27. I therefore find that the petitioner has failed to prove that the respondent committed any of the actions resulting in the constitutional violations claimed. Consequently, the orders prayed shall not be granted and the petition is dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23<sup>TH</sup> DAY OF DECEMBER, 2022.**

**R NYAKUNDI**

**JUDGE**

