



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 38 OF 2012.

IN THE MATTER OF SECTION 75, 76, 81, 82 AND 84 OF THE CONSTITUTION OF KENYA (OLD)

AND

IN THE MATTER OF ARTICLES 19, 20, 21, 22 (1), 23 (1) 23 (3), 27, 29 (D), 39 (S), 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLE 40, 42 AND 70 OF THE CONSTITUTION

BETWEEN

JOSEPH BORO NGERA TRADING AS NGERA FANCY FARM PETITIONER

AND

HON.ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The Petitioner is a citizen of the Republic of Kenya, resident of Nakuru County and trading in the name and style of Ngera Fancy Farm.
 2. The Petition is dated 06/08/ 2012. It seeks declaratory and other orders against the Respondent in the following terms:
 - a. A declaration that failure by the state and/or state agencies to act, intervene thwart and stop invasion of Ngera Farm by illegal grazers and herders and the illegal movement of livestock in the foresaid property was in breach of Articles 31, 40, 42 and 70 of the Constitution of Kenya, 2010.
 - b. A declaration that failure by the state and/or state agencies to invoke and /or enforce the provisions of the Animal Disease Act CAP 364 was in breach of Articles 27, 40, 42 and 70 of the Constitution of Kenya, 2010.
 - c. A declaration that failure by the state and/or state agencies to act, intervene thwart the destruction and/ or looting of the property in Ngera Farm in the height of Post-Election Violence that followed the disputed Presidential elections was in breach of Articles 27, 29 (d), 31, 39 (3), and 40 of the Constitution of Kenya, 2010.
 - d. An order that the petitioner be awarded special damages as follows:
 - a. Total loss as a result of illegal grazing Kshs 87,355,384
 - b. Total loss as a result of post-election violence Kshs 1,416,440,850
- Total loss Kshs 1,503,796,234*
- e. General damages

f. An order that costs of this suit be awarded to the petitioner

g. Any other/ further order or relief that this honourable court may deem fit to grant

3. The Petitioner avers that he started Ngera Fancy Farm with “the best Holstein and Friesian pedigree herds in Kenya” and with a production of well over 3600 litres of milk per day. He claims that his monthly income was between Kshs 800, 000 to Kshs 1,200,000. He also states that he had a modern piggery with a total of 860 pigs by 1998 which earned him between Kshs 300,000 to Kshs 600,000. He also states that he had 350 to 500 heads of small ruminants (sheep and goats) that earned him Kshs 90,000 to 250,000 per month. The Petitioner claims that the farm’s earnings amounted to Kshs 1 million to 1.8 million per month. The farm also had 110 employees.

4. The Petitioner makes two sets of claims. In the first place, he claims that between 1992 and 2007, his farm was illegally invaded by herders occasioning him great economic damage. The Petitioner says that the illegal invasion triggered the transmission of a foreign strain of foot and mouth disease (South African Type 1 – SATI) which led to the decimation of his herds of cows and pigs and other costs (including costs of treatment and other consequential losses). The Petitioner cumulates the total cost of these losses to Kshs. 17,878,884/-.

5. The Petitioner also says that the illegal grazing cost him direct losses in the form of lost crops. This includes loss of sorghum worth Kshs. 6.6 million; loss of boma Rhodes bales worth Kshs. 7,575,000/-; loss of luceana and Rhodes grass pure stand worth Kshs. 16 million; sorghum/Rhodes mixture worth Kshs. 19,132,000/-; maize worth Kshs. 1,125,000/-; and cow candy worth Kshs. 36,169,500. The Petitioner approximates his total losses under this head at Kshs. 87,355,384.

6. In the second place, the Petitioner claims that his farm was invaded during the Post-Election Violence of 2007/2008. He tabulates his losses following the violence to Kshs. 1,416,440,850/-. He has provided the specifics of the alleged losses in both in his Petition and Supporting Affidavit.

7. The Respondent filed a Replying Affidavit of Chief Inspector Bamfort Isurwa. In summary, the Replying Affidavit raises the following five points:

a. That there is no police service in the world that would offer absolute protection to all individuals and their property in any given jurisdiction and their responsibility should be viewed within very limited financial, human resource and equipment resources.

b. The Kenya Police Service is not alleged to have positively occasioned the petitioners any of the alleged loss suffered. The petitioner is not alleged to have suffered any person physical harm to his body and that of his workers in the petition is proof that the Kenya Police Service had to an extent discharged its statutory obligations. They ought not to be held responsible for unnamed 3rd parties

c. It is the obligation of any law abiding citizen to pay taxes which is necessary in financing the police operations and if the petitioner was earning revenue as stated the same should have been proved by way of filed returns

d. There was a civil dispute of trespass and the petitioner had the right to institute civil proceedings against his neighbours. The petitioner from his annexure knew the alleged perpetrators of the damage caused to his property.

e. The Kenyan government did not perpetrate the post-election violence.

8. The parties took directions before the Learned Justice Janet Mulwa. Pursuant to those directions, the parties filed written submissions. Neither party elected to highlight the submissions.

9. As reproduced above, the Petitioner relied on the provisions of the Constitution of Kenya, 2010 to make his case. In particular, the Petitioner has claimed that his case is founded under Articles 27, 29 (d), 31, 39 (3), 40, 42 and 70 of the Constitution of Kenya, 2010. One of the preliminary issues to determine is if the provisions of Constitution of Kenya, 2010 are applicable to this case.

10. The Petitioner claims that his rights were violated between 1999/2000 and 2007/2008 before the promulgation of the Constitution of Kenya, 2010. Several cases have already considered the question whether the Constitution of Kenya, 2010 applies for alleged violations which occurred before its promulgation. A consensus has arisen among the Courts that it does not. This emergent consensus is reflected in **Charles Murigu Muriithi & 2 others v the Attorney General [2015] eKLR** where the Judges stated as follows:

...whether the 2nd Petitioner can lodge a claim for violation of his constitutional rights under the Constitution 2010, over acts that happened during the existence of the Repealed Constitution. Our answer to that question is that this Court cannot enforce new rights created under the new Constitution unless those rights were recognized and protected under the previous Constitution. We make this finding because, in our view, the Constitution 2010 does not have retrospective effect. In this regard, we are in agreement with Majanja J when he stated the following in **Duncan Otieno Waga vs Attorney General Petition No 94 of 2012**; “I do not read the provision of the sixth schedule as entitling the court to retrospectively apply the constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former constitution particularly section 82 which prohibits discrimination.

We shall therefore proceed to determine the Petition on the basis of the rights and obligations of the parties as enshrined in the Repealed Constitution since it was the law in force at the time the alleged violations forming the subject matter of the Petitions now before us allegedly occurred...

11. *Florence Amunga Omukanda & another V Attorney General [2016] eKLR*, *Duncan Otieno Waga v Attorney General Petition 94 of 2012* and *B. A & another v. Standard Group Limited & 2 others [2012] eKLR* are all in accord: in a case such as the present one, the Petition must be determined on the basis of the provisions of the repealed Constitution. Lenaola J. (as he then was) conclusively put it this way in *Arnacherry limited v. attorney General [2014] eKLR*:

...This matter concerns the enforcement of fundamental rights and freedoms under the Bill of Rights... The facts relied upon by the petitioner took place between 2004 and 2008. It is therefore necessary to determine the applicability of the Constitution in determining the claim as a preliminary issue. The effect of Articles 263 and 264 is that the Constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution...The Constitution is only prospective and the acts occurring prior to the Constitution are, unless otherwise stated by the Constitution itself, to be judged by the existing legal regime that is, the former Constitution...[I do not read the provisions of the Sixth Schedule as entitling the Court to retrospectively apply the Constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former Constitution... Counsel for the petitioner has also referred to the provisions of Article 23(1) and 165 which read together entitle any person to apply to the court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this court to adjudicate violations of the Constitution but they do not empower the court to apply the Constitution retrospectively...”

12. I therefore find that this case would be properly adjudicated under the repealed Constitution.

13. It is important at the outset to sketch out the law and standard which is applicable in this kind of case. At its core, the Petitioner’s case is one that claims failure by the government to protect him from the criminal and unlawful activities of third parties. The question that immediately arises is what the outer limits of the general duty of the Government to maintain law and order and protect the property of the citizenry is, and when a citizen can make a claim that that duty has specifically been breached in his case.

Both the Petitioner and the Respondent referred me to some cases in support of their rival positions. The Petitioner referred me to: *President of the Republic of South Africa and Another V Modderklip erdery (Pty) Ltd & Others Case CCT 20/04* (a decision by the Constitutional Court of South African where the state was found liable for damage to private property in a case where the Petitioner took sufficient measures to protect his property, the petitioner in this case took measure by fencing his property, putting up notices advising against trespassing and reporting incidents of illegal grazing to the police and the Provincial Administration); *Pradhan v Attorney General & Another (2002) 1 KLR 1* (where the Court opined that the State is liable where the Police have information about impending criminal activities but take no action); *Roshanali Karmali Khimji Pradhan v Attorney General [2004] eKLR* (where the court found that the State is liable for failure to act quickly to control the situation where the Petitioner’s farm was invaded by armed youth); and *Riss v City of New York 558, 293 N. Y. S 2d at 901* (where the Court held that a duty owed to the public however is not less enforceable because it is owed to everybody).

14. The Respondent primarily relied on *Deshaney v Winnebago County Department of Social Services 109 S. Ct. 998 (1989)* (where the US Supreme Court, does not impose an affirmative obligation on the State to protect the life, liberty and property of its citizens against invasion by private actors but only forbade the State from depriving individuals of life, liberty or property without due process of the law).

15. Fortunately, this is not a virgin area in Kenya. A few of our cases have wrestled with this question. The leading case is *Charles Muriithi Case (supra)*. The three-judge bench of the High Court, after looking at various national and international precedents enunciated the law thus:

It is evident therefore that under both the **Repealed Constitution** and the **Constitution 2010**, the police have a general duty to protect life and property but the question we must answer now is, what is the extent of that duty.....

...It is [...] our finding that the State through its security agencies, including the Police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in the Constitution, including the right to security of the person and to property, would be freely and fully enjoyed by persons within its jurisdiction...[This] duty is a general one owed to the general public and not to specific individuals like the Petitioners.....

The general duty rule was first enunciated in the **De Shaney case (Supra)**. That rule is to the effect that members of the public have no constitutional right to sue state actors who fail to protect them from harm inflicted by third parties. This principle of duty owed to the public at large has been frequently applied in cases involving complaints of inadequate protection during riots or mob violence in the United States of America and also in the United Kingdom. In many of these instances, the preparedness of the Police force to handle such riots and mob violence situations has been challenged. For instance, In **West Minster Investing Corporation (Supra)**, Murphy’s store was destroyed during a riot and it filed a claim contending that the District of Columbia Police Department had deliberately abandoned its policing obligations during the riots and thus permitted rioters to destroy its properties. The United States Court of Appeals for the District of Columbia Circuit held that the District of Columbia had no direct legal obligation to the Plaintiff and that it had no substantive right to recover the damages resulting from alleged failure of the Government or its officers to keep peace. We are attracted to that finding.

16. In a subsequent case, *James Omwoyo Meroka & 2 Others v Attorney General [2016] eKLR*, Justice Onguto, while relying on the *Charles Muriithi Case*, re-stated the general rule and the exceptions thus:

29. In the **Charles Muriithi’s case**, the Court dealt with the nature and extent of that duty. The Court concluded that the State’s duty to maintain law and order through its various security agencies is owed generally to the public at large and not specifically to each and every individual resident in Kenya. The Court was however quick to state that there could be exceptions to this general rule where the State would be held liable. In the Court’s view, for the State to be liable, there must have been a special duty of care

activated by information made available to the State or the police that some members of the public were in danger and the police failed to act on that information. The State would also be responsible where the acts complained of were directly perpetrated against him by the police. Lastly, the State would be liable if the applicant could demonstrate that the police had placed the applicant in danger he would otherwise not have faced.

17. I find these two cases as well as the others cited by the Petitioner to properly state the position of the law on this question: While the state has a positive duty to protect each of its citizen's rights to security of their person and their property, that duty is general in nature and is not owed to any specific individual. Hence, where the State has exercised its due diligence and has done all in its capacity to prevent harm to life, limb and property, no cause of action arises if, in fact, a citizen suffers as a result of unlawful or illegal actions of a third party within the territory of the State. However, this general rule has at least three well-known exceptions:

- a. Where the harm is caused by the positive actions of State agents, for example, where acts leading to loss of life or damage to property is perpetrated by the Police;
- b. Where the State agents have placed the citizen in a dangerous situation she would otherwise not be in; or
- c. Where there is a special relationship between the citizen and the Police on the basis of which Police protection had been assured.

18. Having stated the position of the law, my next task is to apply it to the case at hand.

19. In this case, the Petitioner says the following:

- a. There was an initial illegal invasion of his farm. He reported it to the Police who issued him with a letter on the basis of which the District Livestock Production Officer, Nakuru visited his farm and assessed the damage.
- b. Several other invasions occurred. The Petitioner reported to the Police and the District Commissioner. A number of Administration Police Officers were stationed at the farm to prevent or mitigate further attacks. However, the number proved too few for the scale of the security risk involved.
- c. Ultimately, the Petitioner wrote to the Chair of Nakuru District Security Committee and the Police Commissioner. Pursuant to this letter, it appears that two meetings of the District Security Committee were held. It was resolved that a Police Post will be established at the Farm to respond to any further invasions. It is unclear if the Police Post was ever established. However, the minutes of the District Security Committee attached to the affidavit of the Petitioner shows that the matter was deliberated upon and a decision reached to establish a Police Post to provide extra security to the Petitioner's farm.
- d. The Petitioner blames government agencies for failing to stop the illegal invasions but does not make any allegations that the Police or any other State actors were complicit in the invasion. Indeed, the picture he paints is of a Police Force that was attempting to cope up with the security situation. The letters exchanged between the Petitioner and the Police and other Government Officers also shows that the Police and other Government agencies remained cooperative but failed to ultimately prevent the illegal invasions.

20. As regarding the Post-election violence, the Petitioner does not make any allegations that the Police knew in advance about the attacks and failed to prevent them. For both the pre-2007 invasions of his farm and the post-election invasion, the Petitioner does not make any claim that the Police or any other Government agents were involved in the attacks. Rather, the Petitioner finds the failure by the Government to act to protect him to have been negligent.

21. Applying the test laid down in the *Charles Muriithi Case*, I am not persuaded that the facts revealed in the Petitioner's case can be properly comprehended within any of the exceptions laid down in the *Charles Muriithi Case*. In the first place, none of the instances of invasion complained of were perpetrated by State agents. Secondly, there is no reasonable sense in which it can be said that the Police or State agents put the Petitioner in any situation which was more dangerous and he would otherwise have been. Thirdly, in the circumstances of this case, it would be inappropriate to conclude that a special relationship had been created between the Petitioner and the Police as a result of which the Petitioner had been assured of Police protection. Indeed, the opposite appears to be true. In this case, the correspondence between the Petitioner and the Police shows that the Police, while aware of the security situation, were grappling to find safe protective solutions to the Petitioner given the general security situation in the area and the country.

22. In the present case, there is one other aspect that is worthy of mention. For the instances of invasion which occurred before the Post-Election Violence, it appears from the affidavit of the Petitioner as well as the documents attached to his affidavit, that the Petitioner knew the perpetrators of the illegal farm. If so, then the proper course would have been to sue the perpetrators directly rather than sue the State. The State would only be liable, in such a case, if it failed to provide a just mechanism for the adjudication of the claim.

23. In the *Charles Muriithi Case*, the Court observed the following:

57. [W]e hasten to add that for the State to be liable for its failure to protect the lives and properties of its citizens, there must be a special duty activated by information made available to the State or the Police; that certain individuals or some members of the public were at the risk of being exposed to acts of violence so that the State could in turn take necessary measures to protect the lives and properties of those individuals in question.

58. We make this finding conscious of the fact that due to the poor ratio of police officers against the population in Kenya (a matter we take judicial notice of given its common notoriety), the police cannot be expected to be everywhere at all times or to be guarding individual person's homes or property on a 24 hour basis. The police can only be reasonably expected to offer protection if they have

prior information that acts of violence are expected to be perpetrated in a certain area or against specific persons, homes or property so that they can organize to offer the required protection.

24. In the present case, I have come to the conclusion that though unfortunate, the alleged invasions to the Petitioner's farm cannot properly be attributed to the State. There has been no showing that the State failed to discharge its duty of vigilance.

25. Before concluding, I wish to comment on one final aspect of the case: the quantum of proof required to establish this kind of claim. It is sometimes erroneously assumed that the quantum of proof needed to establish constitutional violations is less than that in the ordinary civil cases. In this case, were the Petitioner to succeed in establishing his claim against the State, he would have had to strictly prove the economic injuries he alleges he suffered. I am not certain that affidavit evidence the Petitioner presented would be sufficient to prove the very substantial losses he claims to have suffered. For example, the Petitioner claims that his farm used to generate profits of up to between Kshs. 1 million to 1.8 million per month. However, no income tax statements are produced to show the same. Self-generated calculations are hardly a credible source of information on economic losses to sustain a case of this nature. Similarly, no independent inventories of the livestock, goods and materials owned by the farm prior to the alleged invasions were produced. Instead, the Petitioner attached inventories of allegedly damaged goods which were generated after the alleged attacks.

26. The ultimate disposition, then, is that, for the reasons stated above, I find that the Petitioner has not sufficiently demonstrated that the State was liable for his losses or that it failed to discharge its duties to maintain order and security in this specific instance to trigger liabilities to the Petitioner as a private citizen. Consequently, the Petition is dismissed. I shall, however, make no order as to costs.

27. Orders accordingly.

Dated and delivered at Nakuru this 30th day of May, 2019

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JOEL NGUGI

JUDGE