



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 44 OF 2016

IN THE MATTER OF ARTICLES 27, 31, 36, 39 & 43 OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
27, 31, 36, 39, & 43 OF THE CONSTITUTION**

BETWEEN

DR. KIRIINYA M. MWENDIA.....PETITIONER

AND

NAIROBI CITY COUNTY.....1ST RESPONDENT

RUNDA WATER LIMITED.....2ND RESPONDENT

RUNDA ASSOCIATION.....3RD RESPONDENT

JUDGMENT

Introduction

1. Dr. Kiriinya M. Mwendia (“the Petitioner”) could pass and be described as part of the landed gentry in Kenya. He owns real property. Some of his property may be found in the revered city suburb of Runda. One of them is of a freehold tenure known as LR No. 7785/334 (“the subject property”). He appears embroiled in disputes with the Respondents touching and concerning his property. Some, if not most, of the disputes have ended up in court. Some have been determined, some have not.

2. The Petitioner filed the instant Petition on 9 February 2016. In four sub-paragraphs by way of relief, the Petitioner sought declaratory orders. He also sought damages.

3. The Petitioner complained that his rights and freedoms guaranteed under the Constitution had been violated.

4. The Petitioner pointed to Article 27 and complained that the Respondents had discriminated against him. The Petitioner pointed to Article 39 of the Constitution and averred that his right to reside anywhere in Kenya had been violated. Then referring to Article 43(d) of the Constitution, the Petitioner asserted that the rules and regulations imposed by the 2nd Respondent for the supply of water services within the Runda suburb were in violation of the Petitioner’s economic and social rights to clean and safe water. The Petitioner also complained that the 3rd Respondent was forcing the Petitioner into the membership of the 3rd Respondent and thus violating the Petitioner’s freedom of association. Finally, the Petitioner complained that the 2nd and 3rd Respondents had infringed upon his right to privacy.

5. The Respondents filed opposing affidavits.

Background and claim

6. The factual background is fairly straight forward.

7. The Petitioner is the registered owner of the subject property situate within Runda Estate. The 2nd Respondent is a limited liability company. Its core business is the supply and distribution of domestic water within Runda and its environs. The 3rd Respondent on the other

hand is an association mainly of the residents of and/or the home-owners within Runda Estate. The 1st Respondent is a County Government established under Article 6(1) of the Constitution.

8. The 2nd and 3rd Respondents insist that the Petitioner enjoys the various services, including utility and common services which the Respondents provide and for which services the Petitioner ought to pay. The services include but are not limited to street lighting, water, street maintenance, security and garbage collection. In the result, the 2nd and 3rd Respondents have billed the Petitioner.

9. The Petitioner contends that, not being a member of the 3rd Respondent and the water services availed and supplied by the 2nd Respondent being more expensive than those of the 1st Respondent, he should not be forced to make any payments. Additionally, the Petitioner states that the 2nd and 3rd Respondents regulations which oblige all residents of Runda and members of the public are illegal, unreasonable and unconstitutional.

10. The Petitioner further contends that the 1st Respondent ought to provide all these services. The Petitioner adds that the services are much more expensive relative to what other residents pay. Accordingly, the Petitioner alleged that his freedom of association was being infringed besides being discriminated against.

11. Flowing from that, the Petitioner seeks a two-fold relief. First, declarations that his rights have been and are being infringed and secondly, damages in compensation.

Responses

The 1st Respondent

12. In answer, the 1st Respondent has pleaded *exceptio res judicata*. The 1st Respondent contends that the dispute and issues raised by the Petitioner have previously been determined by the High Court as between the parties. Particular reference was made to High Court Constitutional Petition No. 501 of 2013 Dr. Kiriinya Mwendia –v- Runda Water Ltd & Runda Association (“the previous action”).

13. The 1st Respondent also contends that there is no act shown or demonstrated by the Petitioner as threatening the Petitioner’s rights. Finally, it is also contended that there is no cause of action against the 1st Respondent.

The 2nd and 3rd Respondent

14. The 2nd and 3rd Respondents did not file any formal response as they were procedurally barred. Attempts to file a response after the Petitioner had testified and closed his case were rejected by the court on 29 August 2016, and the filed Response duly struck out.

15. The 2nd and 3rd Respondents however argued and submitted on points of law. I can say that their response was to the effect that the Petitioner’s claim is *res judicata* as the court in the previous action had with finality determined the issues which were now being raised. Secondly, the 2nd and 3rd Respondents contended that the rates were not prohibited and there was nothing unconstitutional in levying service charge upon a person who was enjoying any services.

Evidentiary hearing

16. The hearing of the Petition proceeded through a conventional trial with the Petitioner giving viva voce evidence and the counsels making submissions.

17. The Petitioner, in his testimony, complained of a demand of Kshs. 56,028/= by the 2nd and 3rd Respondents allegedly for services which the Petitioner stated were the recluse of the 1st Respondent. The Petitioner availed both the rates’ demand note from 1st Respondent as well as demand notes by the 2nd and 3rd Respondents.

18. The Petitioner further testified that he had sued the 1st and 2nd Respondents in the previous action where a final judgment had been rendered. The Petitioner also alluded to other pending suits between the parties.

19. During cross-examination, the Petitioner insisted that he still pays for water to the 1st Respondent. The Petitioner further testified that he pays land rates to the 1st Respondent. The latter payment was for other services which the Petitioner expected the 1st Respondent to provide and which the 3rd Respondent now purports to provide.

20. I did not find any striking element on the Petitioner’s credibility as I watched him testify. He freely and unguardedly answered questions but appeared quite frustrated and angered with the entire litigation. Our litigation system is however adversarial and occasionally, parties tend to literally treat it as such rather than view it as an ordinary dispute adjudication process. The Petitioner’s frustration and anger can only be seen along those lines.

21. The Respondents did not call any oral evidence.

Submissions

The Petitioner submits

22. The Petitioner's counsel Mr. M. Mungai argued that the claim was not *res judicata* as the previous action related only to the issue of provision of water while in the instant petition the Petitioner was complaining about the provision of services for which he pays annual rates.

23. Mr. Mungai referred the court to the case of **Nairobi County Government v Karen & Langata District Association [2015]eKLR** for the proposition that a third party should not be allowed to collect charges, the equivalent of rates, for services being provided by the County Government.

The 1st Respondent submits

24. The 1st Respondent's submissions were limited and were to the effect that;

24.1 There was no cause of action disclosed as against the 1st Respondent.

24.2 The Petition was lacking in particulars especially on how the rights had allegedly been violated.

24.3 The Petition was an abuse of process as the issues raised were *res judicata*.

25. The 1st Respondent relied on the determination in the previous action to illustrate that the instant Petition was *res judicata* and submitted, through Mr. Obondi, that there was need to avoid piecemeal litigation. In this regard, counsel referred to the case of **Njangu v Wambugu & Another HCCC No. 2340 of 1991** as well as the decision of the court in **Okiya Omtata v Communications Authority of Kenya & 14 others [2015]eKLR**.

The 2nd and 3rd Respondents' submissions

26. Again, Mr. Kiche for the 2nd and 3rd Respondents reiterated that the instant Petition was *res judicata*. Counsel insisted that the previous litigation between the parties had dealt with issues of water, membership of the 3rd Respondent association and rates payable to the 1st Respondent. The court in the previous case had held conclusively that there was no violation of the Petitioners rights. Mr. Kiche pointed to s. 7 of the Civil Procedure Act (Cap 21) and to the case of **Council of Governors & 6 others v Senate [2015]eKLR** for the proposition that a controversy once settled by a competent court marked the finality to litigation.

27. On the issue of rates payment, counsel added that Article 209 of the Constitution allowed the County Government to impose it on all rate payers who were mainly land owners. The Petitioner according to Mr. Kiche had not demonstrated that he was exempt under either the Rating Act (Cap 267) or the Valuation for Rating Act (Cap 266). Mr. Kiche finalized his submissions with the footnote that it was not unreasonable for the Respondents to ask the Petitioner to pay for the common services that he enjoyed.

Discussion and Determination

28. Three basic issues emerged when I assembled the pleadings and the oral evidence presented to the court together with submissions made by parties. I isolate the issues as follows: first, is the Petition pleaded with the requisite precision. Secondly, are the Respondents justified in pleading the *res judicata* doctrine. Finally, if the claim is not *res judicata*, has the Petitioner established a breach, violation or infringement of any of his constitutional rights as alleged or at all?

29. I discuss the issues seriatim.

Of pleadings in constitutional litigation

30. The law is relatively settled since **Anarita Karimi Njeru v Republic [1979] KLR 154** that a party who alleges that his rights or freedoms guaranteed by and under the Constitution is under a duty, when he moves the court, to state and detail not only the Articles of the Constitution which guarantee such rights and freedoms but also the right or freedom violated. The applicant is further to particularize the manner and extent of violation: see also **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] e KLR**.

31. The rationale behind the rule as to reasonable precision is to ensure that both the responding party as well as the court is apprised in advance of the issues in controversy. The rule does not invite absolute or artificial precision: **Peter M. Kariuki v Attorney General [2014]eKLR**. Once the court and or the responding party is able to painlessly identify the issues at hand then the Petition must be deemed to have met the threshold, lack of absolute particulars notwithstanding. Where however the claim is lacking in specifics as to leave a party guessing the nature and scope of the breach, the petition will not be allowed to strand the corridors of justice and will be struck out. The court of course must exhibit reticence prior to locking out a party from accessing justice on the basis of particulars which may be supplied at any stage of the proceedings.

32. In the instant case, the Respondents have submitted that the Petition does not meet the ordinary and required standards of drafting.

33. I am ready to fault the Petitioner but only to an extent. The Petitioner pleaded specific Articles of the Constitution. The Petitioner identified Articles 27,31,36,39 and 43 of the Constitution as the relevant Articles violated. The Petitioner then, in my view, only half-heartedly pleaded on the nature, manner and extent of the violations. Save for the plea on the right to privacy and right to clean and safe water, the particulars and pleadings on the alleged violation of the right to equality, right to freedom of association and right to freedom of

movement and residence were rather miserly.

34. The responses by the Respondents did not however tell the story of a party groping in the dark. The Respondents seemed rather aware of the Petitioner's claim perhaps due to the fact that the parties were litigating for the second, if not third, time.

35. There was then also the fact that *viva-voce* evidence was to be presented by the Petitioner.

36. In my view and considering the circumstances of this case, whilst I am prepared to state that the Petition was not complete in terms of drafting and pleadings, I am not ready to hold that the Petition does not pass the reasonable precision test. I was able to discern with little difficulty where the Petitioner's complaint lay and I believe the Respondents were also able to.

37. I decline to hold that the Petition is fatally defective for want of proper pleadings and drafting. The pleadings are in my view reasonably precise.

The exceptio res judicata

38. I turn now to consider the defence of *res judicata*. For this defence the Respondents rely on the facts I set out in the next paragraphs.

39. In October 2013 the Petitioner launched the previous action in the High Court at Nairobi as against the 2nd and 3rd Respondents. The Petitioner complained about the more expensive water being supplied by the 2nd Respondent as compared to the quality water distributed by the 1st Respondent. The Petitioner also then complained about being coerced to join the membership of the 3rd Respondent as a violation of his Article 36 rights. The Petitioner in the previous action also raised issues about being denied access to and from his property.

40. The court having heard the parties on the merits on 29 January 2014 held as follows:

“[24] I am satisfied though, that the Petitioner shall have reasonable access available to the Estate and the orders I propose to make shall deal with this concern of access. The Petitioner is not a member of the Runda Association but [as] 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 members of the Association for the services which he receives. To insist that he pays for common services provided to all residents is not a violation of his freedom of association protected under Article 36 of the Constitution”.

41. The court further held and stated as follows:

“[27] In conclusion, 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 provision of certain services. The Petitioner as a resident of the area cannot insist on exercising his rights without regard for the rights of others or benefit from services without paying for them. Likewise, the Respondents cannot impose unnecessary burdens on the Petitioner which prevent him from enjoying his property”.

42. The court then granted the following final reliefs.:

a) The Petition shall be at liberty to apply and the 1st Respondent [Runda Water Ltd] shall consider the Petitioner's application for water connection.

b) The Petitioner shall only be subject to and charged any levies applicable to all the members of the Association.

c) Subject to the Petitioner complying with the rules governing the residents of the Estate, the Respondents are restrained from interfering with the Petitioners construction on Land Reference No. 7785/334

d) Either party shall have liberty to apply for further and other orders.

e) There shall be no order as to costs.”

43. The Respondents in the instant petition argue that on the basis of the above facts and holding, this matter is *res judicata* .

44. I have no doubt that in matters involving the enforcement of the Bill of Rights, a plea of *res judicata* must be considered with abundant caution as rights to any fundamental freedoms might be violated multiple times even after a court decision has been handed down. Constitutional claims are however not imperious to the pleas of *res judicata* and *sub judice*: see **Aggrey Chiteri v Republic [2016]eKLR**. The court will always apply the doctrine where appropriate to ensure that parties to a final judicial decision do not re-litigate the same question afterwards.

45. The requirements for a successful reliance on the doctrine of *res judicata* may be put basically to be whether the same or substantially same issue is involved in the two actions. In other words, the question is whether the same thing is demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, put more succinctly, has the same issue now before the court been finally disposed of in the first action: see generally **Henderson v Henderson [1843] Hare 99** and **Pop in (Kenya) Ltd & others v Habib Bank AG Zurich [1990] KLR 609**.

46. The Petitioner's case is founded currently on matters touching and concerning his property (LR. No. 7785/334). The previous action also touched and concerned the Petitioner proprietorship, user and enjoyment of the same property alongside another property known as title no. Nairobi/Block 99/10 wherein the Petitioner resides.

47. The current Petition has invoked the rights and freedoms under Articles 27, 31, 36, 39 and 43 of the Constitution. The previous action also touched on, discussed and made determinations on these Articles except for Article 31 (as to privacy).

48. The court determined with a great degree of finality the issues relating to the Petitioner's right of access to his property and to his residence. The court also determined issues relating to the (in)voluntary membership of the 3rd Respondent including the application of rules and regulations of the 3rd Respondent. The court expressly restrained the 2nd and 3rd Respondents from interfering with the Petitioner's construction on Land Reference No.7785/334. The Petitioner has apparently revisited these issues.

49. From the above, I have no hesitation in coming to the conclusion that the Respondents' defence of *res judicata* was well taken.

50. The Petitioner's complaints have been previously determined. Even though the Petitioner insisted during re-examination that his current claim is "*about monies demanded by the 2nd Respondent from me for services rendered by the 1st Respondent*", the basic issue as to whether the Petitioner could and must pay for services allegedly rendered by the 2nd and 3rd Respondents had already been determined, in my view, by the decision of 29 January 2014. The court was clear that the Petitioner would be subject to and be charged any levies applicable to all members of the 3rd Respondent and it did matter not that the Petitioner was not a member. What mattered and still matters is that the Petitioner enjoys and benefits from the services. As stated by the court then;

"[27]...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. Likewise, the Respondents cannot impose unnecessary burdens on the Petitioner which prevent him from enjoying his property."

51. I did not hear the Petitioner to point to any unnecessary burden. If there was any imposed by the Respondents, the Petitioner could only have moved the court in the same cause that is to say, in the previous action, where liberty to apply had been granted.

A question of privacy

52. It leaves me with the question of privacy which was not before the court in the previous action.

53. The facts and circumstances leading to this issue arose in September/October 2015, some nine or ten months after the court's decision. The complaint focuses on a newsletter issued by the 3rd Respondent. I have read extracts of the newsletter as exhibited by the Petitioner. It contains a commentary; nay, quotes, extensively obtained from the judgment in the previous action.

54. The Petitioner complains that the 2nd and 3rd Respondent's have by publishing and adversely commenting on the construction being undertaken by the Petitioner on his property, infringed on the Petitioner's right to privacy.

55. There is no doubt that the right to privacy is fundamental indeed to the exercise of all other rights. In its simplest sense, privacy essentially allows each human being to be left alone in a core. Yet the autonomy of such individual is also conditioned by his relationship with the larger society. It is for this reason that the right to privacy is not absolute under our Constitution. Challenges to the right to privacy must thus be addressed in the context of a global and general information based society. The individual is connected to the world. He has a right to know and the society too has a right to information and knowledge. The society and individual will thus always cross paths as far as this right is concerned.

56. Information touching on and concerning an individual that is already in the public domain cannot, in my judgment, be deemed private and where it is disseminated it cannot be said that the right to privacy has been infringed. Yet any arbitrary intrusion or incursion into a person's privacy will not be allowed or entertained. The Constitution at Article 31 expressly prohibits arbitrary searches of persons, homes and property. The Constitution also prohibits seizure of possession. Likewise information relating to person's family or private affairs is not to be unnecessarily required or revealed. In effect the sanctity of the home is mixed with personal liberty which entails privacy as to personal information and communication.

57. The dignity of an individual is protected by the right to privacy and even the mere interaction with the public does not mean the rationale for the right to privacy will cease to exist. It is all about the right to be left alone even where there are other people: see **Warren and Brandeis, "The Right to Privacy" Harvard Law Review [1890] 4 HLR 193.**

58. In their article Warren and Brandeis place the development of the right to privacy on the 18th century advent of urbanization and newspaperization, or the increasing presence of the print media. And even though Warren and Brandeis suggested and advocated the use of the common law to vindicate the right to privacy, the right has over the centuries evolved to form part of the constitutional and international law dictates and norms. The individual is simply to be left alone to exercise control over his or her personality, property and home: see **International Covenant on Civil and Political Rights-Art. 17 and the Universal Declaration on Human Rights-Art. 12.**

59. Of course, the evidential burden is on the Petitioner to satisfy me on a balance of probabilities that his right to privacy has been violated: see **Matiba v Attorney General [1990] KLR 666.**

60. In this regard, the evidence availed by the Petitioner was a newsletter printed by the 3rd Respondent. I have already indicated that the newspaper quoted extensively and verbatim the decision of the court in the previous action. I have read the newsletter writing again. I am not

satisfied that the material availed show a transgression of the Petitioner's privacy.

61. In my view, if there is intrusion or invasion on a situation where a person can reasonably expect his privacy either of his person, home or property to be respected then such intrusion will amount to a violation of the constitutionally guaranteed right to privacy, unless the intrusion is justified under Article 24(1) of the Constitution. I am unable to see how the Petitioner having ventured into litigation with the Respondents over his development could reasonably expect that the privacy of his property (the suit property) would be absolutely respected every time the Respondent had to relate to or comment on the previous action filed by the Petitioner. The Respondents in relating the case determined by the court in 2014 to the Petitioner's property, in my view, were not particularly intrusive.

62. Taking the circumstances of this case in its totality including the myriad of court and tribunal contests, the nature of the activity by the Petitioner on his property, the place where the alleged intrusion took place, as well as the purpose of the intrusion which was to relate the property to the previous action as determined by the court, in my view it is not arguable that the Petitioner had a reasonable expectation of privacy in his property. The Petitioner opened his property up to scrutiny by the Respondent the moment it became part of the subject matter of litigation and expectations of absolute privacy under the circumstances would be unreasonable.

63. I return the verdict that in the totality of the circumstances, the Petitioner has not convinced me to the required standard that his right to privacy was violated by the Respondents in publishing a newsletter which alluded to the Petitioner and his property.

Conclusion and Disposal

64. Let me now draw the threads together in conclusion.

65. The Petitioner has lodged various cases against the Respondents, some have been determined, some have not. They all revolve around the Petitioner's rights and freedoms as protected by the Constitution.

66. One of the Respondents' core submissions was that a majority of the residents of Runda Estate are basically contented with the 2nd and 3rd Respondents on the services provided. I have decided the Petitioner's claim largely on the basis that it is *res judicata* and also to an extent of want of proof on the issue of the right to privacy. I could not and was not about to decide the petition on the basis of majoritarianism. The guarantee of constitutional rights does not ever depend on majoritarian opinion. It should matter little that a majority of the residents of Runda Estate are members of the 3rd Respondent. What should bother the Respondents is upholding the Constitution and its tenets, even as the courts direct grumbling residents to live harmoniously. A majority may for example accept a regulation which allows an unnecessary uncontrolled and unhindered inspection and search of persons or residents ingressing the Runda Estate yet the regulation may be clearly unreasonable and unconstitutional. The justification may not be fetched on the majority and constitutional dictates will certainly prompt the nullity of such a regulation.

67. Ultimately, while the petition on the average met the legal drafting test, the Petitioner must be held culpable of abusing the court process by seeking to continue litigation already determined. The Petitioner is bound by the judgment in the previous action.

68. The Petitioner as well, in my judgment, failed to establish a case for violation of his right to privacy. The petition was reasonably precise but the evidence was scarce on the issue of privacy.

69. It is appropriate that I now order a dismissal of the instant Petition but not before I apologize to the parties for the anxiety caused by the year long delay in rendering this judgment. The circumstances were simply beyond my control and as has been explained by the Deputy Registrar on the files' mix up.

70. The Petition is dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 9th day of February, 2018

J.L.ONGUTO

JUDGE