



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CONSTITUTIONAL PETITION NO. 2 OF 2016**

**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS AND IN PARTICULAR ARTICLES 40 & 47 OF THE CONSTITUTION OF KENYA 2010**

*between*

**LLYOD PATRICK WAFULA WANYONYI**

**T/A LLYODS (1996) MOLASSES SUPPLY AGENCIES ..... PETITIONER**

*And*

**THE ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

1. The petitioner **LLOYD PATRICK WAFULA WANYONYI** has filed this constitutional petition against the Attorney General (the Respondent) alleging that his business Lloyds (1996) Molasses supply Agencies had its constitutional rights, embodied in Articles 40 and 47, violated.
2. The petitioner's case is that he engaged in the business of supplying and distribution of Molasses as an additive to animal feeds. He pleaded that he is licenced by the relevant agencies to carry out that business. Indeed he attached, to his affidavit in support of the petition, a procurement permit of Agriculture, Fisheries and Food Authority. That permit shows that the petitioner was permitted to procure from Nzoia sugar company 20 tonnes of molasses per month for the year 2015.
3. Petitioner further pleaded that: **“On 14<sup>th</sup> July 2015 a contingent of police officers led by administration officials including Officer Commanding Police Station, the County Commissioner, the County Police Commander and the Sub-county administrators unlawfully”** and without justification trespassed the petitioner's business premises within Muthaiga Estate in Nanyuki and poured petitioner's raw molasses valued at Kshs.816,000 on the petitioner's farm and carted away from the petitioner's premises 139 drums valued at Kshs.412,000. As a consequence of that action petitioner pleaded that this business was disrupted causing a loss of Kshs.4,700,000 and loss of crops valued at kshs.150,000.
4. The petitioner further pleaded that :-
  - i) He is entitled to fair administrative action under Article 47 of the Constitution of Kenya, 2010.*
  - ii) He was not notified of the intended action nor was he given any reason for the illegal acts visited on him.*

*iii) The government officials were showed but ignored the petitioner's licences and permits authorizing him to deal in molasses as an animal feed additive.*

*iv) The records of the petitioner's business and permits were in the custody of government agencies and or could easily have been procured by government.*

*v) The petitioner's rights under Article 47 were breached.*

5. Petitioner therefore sought the following prayers.

*a) A declaration that the petitioner's rights under Article 40 and 47 were breached.*

*b) A permanent injunction to prevent the government of Kenya and its agencies from interfering with the petitioner's business known as Lloyds(1996) Molasses supply Agencies unless such interference is sanctioned by the law and subject to the petitioner's right under Article 47 of the Constitution of Kenya 2010.*

*c) An order that the petitioner be compensated to the full extent of his losses as outlined in the petition.*

*d) An order that the petitioner be compensated in general damages as may be quantified by this Honourable Court.*

*e) An order that costs of this petition be borne by the respondent.*

6. The petition was opposed by the respondent. By the affidavit of Francis O. Makori the litigation counsel of the respondent the respondent deponed that the petition was “**misguided, misconceived and ..... legally untenable.**” Further it was deponed on behalf of the Respondent that the petition was “**grounded on vague conjecture and suppositions.**”

7. I have considered the petition, the replying affidavit of the respondent and the parties written submissions. It is trite that the burden of proof is on the person alleging. The petitioner in my view, as correctly submitted by the respondent failed to meet the burden of proof in this case. The petitioner's petition is merely made up of generalized allegation which allegations fail to be proved by any material evidence. In this regard I rely on two cases. The first is **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE AND OTHERS, Nairobi Civil Appeal No. 290 of 2012** where it was stated:-

*“Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justices as they give fair notice to the other party. 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.”*

8. The second case is **ANARITA KARIMI NJERU –VS- ATTORNEY GENERAL (1979) KLR 154** where the court stated:-

*“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 reasonable degree of precision that on which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”*

9. The petitioner, although attached a procurement permit failed to show by documentary evidence that prior to the alleged trespass by police officers he had procured and was therefore in possession of molasses which allegedly was poured by the said officer. The petitioner ought to have provided

documentary proof that there was any such molasses as he pleaded which was poured. Instead the petitioner put figures in his petition which he pleaded that they represented the value of the molasses allegedly poured out; value of damaged crops; value of drums taken away during that trespass; and the loss of business. Without evidential proof of the stated loss this court can only conclude that the figures in the petition were plucked from the air and pleaded in the petition. The petitioner ought to have obtained an expert opinion on the value of the molasses and of the damaged crops. He also ought to have produced accounts of his business to prove that his business suffered loss following the alleged trespass. These claims were essentially special damages claim. They therefore ought to have been specifically claimed and proved. This is what the court in the case **ZACHARIA WAWERU THUMBI VS SAMUEL NJOROGI CIVIL APPEAL NO. 445 OF 2003** stated:-

*“ ..... The law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 (1985)KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:- “Special damages must not only be specifically claimed (pleaded) but also strictly proved ..... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decrees of certainty and particularity of proof required depend on the circumstances and nature of the acts themselves.” ..... If I were to explain or define, special damages to a layman, I would say “they are a reimbursement of the Plaintiff/victim of the tort, for what he has actually spent as a consequence of the tortuous act (s) complained of”. This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test ....”*

10. The petitioner also failed to prove that the premises allegedly trespassed was premises of his business. In fact the certificate of registration of his business shows that business was run at plot No. 209/2159/60 Impala Hotel Parklands Road, Nairobi. The alleged trespass of the business premises according to the petition, however, as pleaded in the petition, was stated to have been at Muthaiga Estate in Nanyuki.

11. The respondent, in my view quite correctly submitted that the petitioner also failed to identify the names of the alleged violators of his constitutional rights. Indeed it will be recalled that earlier in this judgment the police rank of the alleged violators of petitioner’s constitution were stated. Other than giving their supposed rank the petitioner failed to give the names of those officers.

12. The various accounts above of the petitioner’s failure to prove his case must end in the dismissal of his petition. The petitioner failed to prove his claims in special damages; and he failed to show the manner, nature and extent of the infringement pleaded in the petitioner. **In the end the petition is hereby dismissed with costs to the respondent.**

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF DECEMBER, 2016**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant .....

Petitioner: Llyod Patrick Wafula Wanyonyi .....

For Petitioner: .....

For Respondent: .....

**COURT**

Judgment delivered in open court

**MARY KASANGO**

**JUDGE**