



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Petition No. 70 Of 2014**

**IN THE MATTER OF: ARTICLES 10, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 35, 39, 40, 47, 48, 50, 258 & 259 SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION**

**IN THE MATTER OF: THE ALLEGED DISCONNECTION OF WATER TAPS AND METERS OF THE PETITIONERS BY THE MOMBASA WATER SUPPLY AND SANITATION COMPANY LIMITED**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 21 AND 22 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**GABRIEL AMOK & OTHERS SUING IN THEIR CAPACITY AS MOMBASA**

**KIOSK WATER VENDORS-SELF HELP GROUP.....PETITIONERS**

**AND**

**MOMBASA WATER SUPPLY & SANITATION CO. LTD.....RESPONDENT**

**RULING**

1. This Ruling relates to a Petition dated 11<sup>th</sup> November, 2014 and filed on 11<sup>th</sup> November, 2014 and in which the Petitioners seek the following orders:

- a. *A declaration that the Petitioners fundamental rights and freedoms to the protection of their property and from arbitrary deprivation thereof as well as the right to fair administrative action, access to information and to fair hearing have been breached,*
- b. *A declaration that the Respondent and its agents have acted in breach of Articles 10, 20, 21, 22, 23, 25, 27, 28, 35, 40, 47, 48, 50, 258, and 259 of the constitution,*
- c. *A declaration that the petitioners water taps and meters have been illegally, wrongfully and unlawfully disconnected,*
- d. *An order directing the Respondent to carry out thorough investigations into the issue of cartels running the water vending operation together with water vendors kiosk owners and other stakeholders,*

- e. **Consequently an order prohibiting the Respondent whether itself or through other persons from interfering with the petitioners property or enjoyment of water vending kiosks venture,**
- f. **Costs of the petition be borne by the Respondent.**
- g. **Any other relief as the Honourable Court deems fit.**

2. The Respondent is the provider of water to the City of Mombasa and its environs. It opposed the Petition through the Replying Affidavit sworn and filed on 10<sup>th</sup> January, 2014.

3. By agreement of parties it was ordered that the Petition herein be determined by way of written submissions. The Petitioners' counsel's submissions are dated and were filed 5<sup>th</sup> March, 2015. The Respondent's counsel's submissions dated 26<sup>th</sup> February 2015 were dated on 26<sup>th</sup> in January, 2015.

### **The Petitioner's Case**

4. The Petitioners who in my count number fifty two (52), say that they are **Mombasa Kiosk Water Vendors – Self Help Group** who earn their living by selling water to consumers in designated geographical areas of the City of Mombasa where the Respondent is unable to get services or yet to be developed to a level where the Respondent can install and service individual water meters to consumers including the Petitioners. This is implicitly acknowledged by the Respondent in its Replying Affidavit.

5. The Petitioners however complain that the Respondent without as much informing them, that is, in breach of the rules of natural justice –*audi alteram partem* (hear the other party), has engaged in a systematic process of disconnecting the supply of water to their kiosks. This has led to loss of livelihood for them and others and is also in breach of their legitimate expectation that they would not be disconnected from supply to their supply points, and thus they have therefore been discriminated and denied equality before the law contrary to Article 27 of this Constitution of Kenya 2010.

6. In support of their Petition Counsel relied upon the cases **OF KEROCHE INDUSTRIES LIMITED vs KENYA REVENUE AUTHORITY AND 5 OTHERS [2007] e KLR, STEPHEN NDUBOI & 27 OTHERS VS BROOKESIDE DAIRY LIMITED [2007] e KLR.**

7. On their part, the Respondent opposes the Petition, and in the Replying Affidavit aforesaid say that the Petitioners are an amorphous body that it is not defined in law and is not recognized by the Respondent. It does not and has never opened water account for any such group, that contracts of water accounts are personal contracts and cannot be entered into on behalf of another person or group of persons, that the Petition raises no constitutional issue and should have been brought by way of an ordinary civil suit based upon breach of contract (if any).

8. More fundamentally the Respondent deponed that the majority of the alleged customers are not registered with the Respondent as consumers, and that some of those registered (about 16 in number, in my count), are either in arrears in their payments and have been disconnected, or have outstanding balances owed to the Respondent. Only Petitioner Joel Misango has zero balance in his account. The others approximately thirty(30) Petitioners do not appear any where in the Respondent's database, and the Respondent does not therefore recognize their existence.

9. Whether or not the Respondent does recognize the legality of the Petitioner's existence is really immaterial. The issue is whether the Petition raises any constitutional issue for determination by this court.

10. In that consistently misunderstood and criticised decision of the court in **ANARITA KARIMI NJERU vs REPUBLIC [1979] KLR 154;** regarding the principles of drafting of a Petition, it remains correct to say as the court held:

***“...Whoever alleges a constitutional infringement (if only to ensure that justice is done to his***

*case) should set out with a reasonable degree of precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”*

11. The Petitioner’s contention is that their fundamental rights and freedoms under Articles 10, 20, 21, 22, 23, 25, 27, 28, 35, 40, 47, 48, 49, 50, 258-259 of Kenya 2010 have been contravened. Put differently the Petitioners’ argument is that the Respondent has not adhered to the principles of good governance as set in Article 10 of the Constitution, and has also failed to give effect to the like provisions of Article 21 of the Constitution which binds the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights,(Chapter four of the Constitution).

12. The Petitioners also claim that the Respondent has been in breach of Article 27 of the Constitution which grants every person equal protection and benefit of the law and that equality includes the right to fair administrative action that is to say, action that is expeditious, efficient, lawful, reasonable and procedurally fair.

13. The question that therefore remains for determination is whether, the Respondent has breached any of the said provisions of the Constitution cited above. It is not possible nor necessary within the scope of this Petition and this Ruling in particular to discuss all the possible ramifications of Articles 10, 20, 21, 22, 23, 25, 27, 28, 35, 40,47,48,50,258 and 259 of the Constitution. It is however necessary to state that every person and group (provided individual membership thereby is disclosed), has a right of access to the courts under Article 22 of the Constitution on a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or even threatened.

14. Similarly it is also fair to state that Article 27 of the Constitution guarantees every person equality before and benefit of the law and to protection of property, (Article 40), and that the Petitioners are entitled to fair administrative action as guaranteed under Article 47, and to access to justice as guaranteed by Article 48 of the Constitution.

15. Petitioners are already before court, they have an unqualified right to access the courts in the manner they have done as individuals as members of a group. Technically because registration and a Certificate of Registration of a Self-Help Group Project, under the Ministry of Gender, Children and Social Development does not confer legal personality upon members thereof, suing as a group confers a right upon busy-bodies who engage the other litigants (Respondents/Defendants), at great cost which such Respondents/Defendants may not in the end recover should the Group’s litigation fail. Though the access to courts under Article 22(2) is unqualified, that danger must always be recognized by the courts that the Constitutional process must not be used frivolously where other remedies through civil action would be equally appropriate and effective.

16. The Respondent is a private Limited Liability Company duly incorporated under the Companies Act, (Chapter 486, Laws of Kenya). Even though its shareholding may be held by the County Government of Mombasa [as successor to the defunct Municipal Council of Mombasa], the Respondent remains a private entity. The obligation to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bills of Rights is the fundamental duty of the state and every state organ. Under Article 260 of the Constitution, a state organ means a “**Commission, office, agency or other body established under the Constitution**”. It is thus trite law as this court has repeatedly held that fundamental rights are only enforceable against the state or the government as it defined under Article 260 aforesaid. The government does not include limited liability companies.

17. In **TEITWNNANG vs ARIONG and OTHERS** [1987] LRC CONST.577 the court stated-

*“Dealing with the question can a private individual maintain an action for a declaration against another private individual or individuals for breach of fundamental rights provisions of the constitution. The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of government. It contains rules about the Government and the country. It follows therefore that the duties imposed by the constitution under the fundamental rights provisions are owed by the government of the day to the*

governed.

*I am of the opinion that an individual as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to the individuals under the fundamental provisions of the Constitution.*

*... the Constitution is the supreme law of the land, but it is to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice, and in this case we adopt and endorse the decisions in the case of HARRIKSON vs. ATTORNEY-GENERAL OF TRINIDAD & TOBAGO [1980] AC 265, where a teacher was transferred to another school without being given three months notice required by the provisions of the Teachers Service Commission(Act). He applied under Section 6(x) of their Constitution for redress (similar to our Section 84, now Article 22) and the Privy Council in rejecting his appeal said at page 268, paragraph B.C.*

*“The notion that whenever there is a failure by an organ of government or public authority or Public office to comply with the law this necessarily entails the contravention of some human rights or individual freedoms guaranteed to individuals by Chapter I of the Constitution, (our Chapter V, now Chapter IV), is fallacious. The right to apply to the High Court under Section 6 (our Section 84 now Article 22) of the Constitution) for redress when any human rights or fundamental freedom is likely to be contravened is an important safeguard of these rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for invoking judicial control of administrative action.. The mere allegation that a human right has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the Section (Article) if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”*

18. Having been granted *locus standi*, having been heard, the question is whether any rights of the Petitioners have been contravened, infringed or threatened with such contravention, infringement or threat. To answer that fundamental question, the other fundamental question that must first be answered, is what exactly is the right of the Petitioners that is threatened with contravention, infringement or breach?

19. The Petitioners contend and the Respondent agrees at least in respect of those who have demonstrated per the affidavit verifying the Petition that they have a contractual relationship by way of annual licence to draw and distribute water for domestic use at points designated by the Respondent in accordance with its Water Kiosk Management Policy published in November, 2011, on issuance of Kiosk licences to, in particular-

- 1) **Women groups**
- 2) **Youth Groups**
- 3) **Physically disabled persons**
- 4) **Orphans and widows**

for the purpose of economically empowering these groups.

20. By its nature and definition, in law a licence is necessary authority granted by a person natural or juridical, in short, a competent authority, to another such person to carry out certain acts or render services at a fee or otherwise. What at common law is a bare licence can be revoked at the will of the

grantor at any time, a **contractual licence** granted under the terms of a contract is subject to the terms of the contract.

21. By way of analogy of **landlord and servant** the fundamental right which a tenant has that distinguishes his position from that of a licensee is an interest in land as a personal permission to enter the land and use it for some stipulated purpose or purposes, and that right is ascertained by seeing whether the grant was given a legal right of exclusive possession of the land for a term or from year to year or for life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation for such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of and for a term is not a tenant is simply to contradict the first proposition by the second. A reservation to the landlord, either by contract or statute, of a limited right of entry as for example to view to repair, is of course not inconsistent with the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long established law. See Cole, Ejectment [1857] Page 72-73, 287,

22. In contrast to a licence, the licensee has only a right to take a product or render a service in terms of the licence. Such right is unlike tenancy, does not confer exclusive right to the licensee outside the terms of the licence. It is a limited right, it terminates in accordance with its terms. That right is neither human right nor a fundamental freedom. It is merely a contractual right. It determines in accordance with its terms. Any party, the Petitioners or the Respondent is at liberty to institute civil proceedings claiming a breach by the other and claim the moneys owed by the Petitioners, or damages as against the Respondent. What the court cannot do is to allow the Petitioners to use and thereby abuse the provisions of the Constitution on purely private contractual matters in which they can seek remedy by civil actions.

23. For those reasons, I find no constitutional issue in this Petition and no contravention of any right or fundamental freedoms of the Petitioners or any of them.

24. The Petition dated and filed on 11<sup>th</sup> November, 2014 is therefore dismissed with a direction that each party shall meet its respective costs.

25. There shall be order accordingly.

**Dated, delivered and signed at Mombasa this 25<sup>th</sup> day of March, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In open court

In presence of

Mr. Lumatete for Petitioner

Mr. Mohamed for Respondent

Court Assistant – Mutisya