



**Mwendia v Runda Water Limited & another (Petition 501 of 2013)
[2014] KEHC 7537 (KLR) (Constitutional and Human Rights) (29 January 2014) (Judgment)**

Kiriinya M. Mwendia v Runda Water Limited & another [2014] eKLR

Neutral citation: [2014] KEHC 7537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 501 OF 2013

DAS MAJANJA, J

JANUARY 29, 2014

BETWEEN

DR. KIRIINYA M. MWENDIA PETITIONER

AND

RUNDA WATER LIMITED 1ST RESPONDENT

RUNDA ASSOCIATION 2ND RESPONDENT

The Right to Own, Use and Develop Property is not Absolute.

Reported by Andrew Halonyere

***Constitutional Law** - fundamental rights and freedom - right to property - where the Petitioner lived in a community of other property owners who had voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life - whether in the circumstances the parties' right to own, use and develop property was absolute - Constitution of Kenya, 2010 article 40.*

***Constitutional Law** - fundamental rights and freedoms - right of association - where a petitioner lived in a gated community and was a beneficiary of the common services - whether by being coerced to join the association directly or indirectly was a violation of his freedom of association - Constitution of Kenya 2010 article 36, 40.*

Brief facts

The Petitioner was the registered proprietor of two properties of land situated in Runda Estate within Nairobi. The 2nd Respondent was an association of the residents of Runda Estate and it was involved, *inter alia*, in providing and maintaining common services in the area. It owned and operated the 1st Respondent company, Runda Water, which supplied water to the area residents.

The Petitioner submitted that in 2011, he decided to commence development on one of his properties and in that respect he applied for a change of user and planning permission in order to construct a Health and Fitness centre and staff housing, which was approved by the City Council of Nairobi.



The Petitioner avered that Nairobi City Water and Sewerage Company was providing him with water until when Runda Water stopped the water connection being supervised by NCWSC. According to the Petitioner the Runda Police thereafter destroyed his water pipes and construction material and took equipment.

The Petitioner's argument was that his construction work had been inconvenienced, he had suffered loss and damage and his right to use and enjoy his property protected under article 40 of the Constitution had been violated by the Respondents. The Petitioner also maintained that he should not have been compelled to join Runda Association whose membership was entirely voluntary and that to coerce him to join the association either directly or indirectly was a violation of his freedom of association guaranteed under article 36 of the Constitution.

Issues

- i. Whether the right to own, use and develop property as enshrined under article 40 of the Constitution was absolute.
- ii. Whether the Petitioner by being coerced to join the association directly or indirectly was a violation of his freedom of association guaranteed under article 36 of the Constitution.
- iii. Under what circumstance could the Court interfere with statutory bodies charged with the responsibility of enforcing by laws?

Held

1. Each water service provider had exclusive jurisdiction to supply water within a specific area and was licenced as such. Therefore the Petitioner had no right to receive water from Nairobi City Water & Sewerage Company (NCWSC) or any other water company of his choice and the Court could not vary the terms of Runda Water Service Agreement for his benefit. As the Petitioner's property fell within Runda, he was entitled to apply to Runda Water for the connection and each water service provider was licensed on condition that it met the standards of water quality and its tariffs were approved by Water Service Regulatory Board through a process of public participation.
2. The intent of the Water Act, 2002 was to provide quality water at reasonable cost to consumers. The Petitioner had made vague complaints about the cost and quality of water provided by Runda Water but he had not lodged any complaint with the Water Service Regulatory Board or Athi Water Service Board which had statutory authority to deal with complaints of that nature. The Petitioner had not established any violation of article 46 of the Constitution and was therefore required to source his water from Runda Water as the exclusive water service provider for the area.
3. Regulation of access to roads was a matter regulated by the Nairobi City County by-laws and the regulations issued by the Kenya Urban Roads Board under the Roads Act. Both public bodies had powers to enforce their authority and ensure compliance with the conditions imposed on any development and as such not every breach of a bylaw or regulation resulted in a breach of the Constitution or required that the Court address it as such. Statutory bodies charged with the responsibility of enforcing laws ought to be given an opportunity to exercise their authority before the Court intervened to resolve the matter on the basis of the Constitution.
4. There had been no complaint lodged by the Petitioner with either the Nairobi County or the Kenya Urban Roads Board. Neither had the Petitioner alleged that those bodies had refused, failed or neglected to act on the Petitioner's complaints. In the circumstances the Court could not make a finding on the constitutionality of the breach of statutory regulations.
5. The Petitioner was not a member of the Runda Association but he was a beneficiary of the common services it provided including security, maintenance and upkeep of the Estate. It was not unreasonable for him to pay the fees applicable to all the members of the Association for the services which he received. To have insisted that he pays for common services provided to all residents was not a violation of his freedom of association protected under article 36 of the Constitution.



6. The claim for damages was not supported by any documentary evidence, expert reports and assessments regarding the basis, nature and extent of loss and damage. The Petitioner had to furnish specific evidence of his loss and damage.

7. The Petitioner's right to own, use and develop his property was not absolute. He lived in a community of other property owners who had voluntarily agreed to live by certain rules to ensure that they maintained certain standards and quality of life by making provisions for certain services. The Petitioner as a resident of the area could not insist on exercising his rights without regard for the rights of others and or benefit from services without paying for them. Likewise, the Respondents could not impose unnecessary burdens on the Petitioner which would prevent him from enjoying his property.

Petition Allowed.

Orders

- a. *The Petitioner was at liberty to apply and the 1st Respondent was to consider the Petitioner's application for water connection.*
- b. *The Petitioner would only be subject to and charged any levies applicable to all the members of the Association.*
- c. *Subject to the Petitioner complying with rules governing the residents of the Estate, the Respondents were restrained from interfering with the Petitioner's construction on his property in Runda.*
- d. *no orders as to costs.*

Citations

Cases

Kenya

1. *Masai, Wafula v Runda Water Limited Petition No 492 of 2013* - (Followed)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 36, 40, 46, 259(2)(c) - (Interpreted)
2. Consumer Protection Act, 2012 (Act No 46 of 2012) In general - (Interpreted)
3. Kenya Roads Act, 2007 (Act No 2 of 2007) sections 49, 53 - (Interpreted)
4. Physical Planners Registration Act, 1996 (Act No 3 of 1996) sections 33(2); 34 - (Interpreted)
5. Public Roads and Roads of Access Act (cap 399) section 15 - (Interpreted)
6. Water Act (cap 372) section 51, 55 - (Interpreted)

Advocates

1. Mr Njomo instructed by Kamotho Njomo and Company Advocates for the Petitioner.
2. Mr Bwire instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the Respondents.

JUDGMENT

1. The Petitioner is the registered proprietor of two properties LR No 7785/334 and Nairobi/Block 99/10 situated in the up-market suburb known as Runda Estate within Nairobi. He resides on Nairobi/Block 99/10.
2. The 2nd Respondent is an association of the residents of Runda Estate and it is involved, inter alia, in providing and maintaining common services in the area. It owns and operates the 1st Respondent company, Runda Water, which supplies water to the area residents. The petitioner avers that he is not a member of Runda Association. He also states that he is supplied water by the Nairobi City Water and Sewerage Company Limited ("NCWSC")



3. In 2011, he decided to commence development on LR No 7785/334 and in that respect he applied for a change of user and planning permission in order to construct a Health and Fitness centre and staff housing. By a letter dated 18th July 2011, the City Council of Nairobi approved the plans. The permit was renewed on 18th July 2013.
4. The Petitioner avers that NCWSC was providing him with water until on or about 6th November 2011 when Runda Water stopped the water connection being supervised by NCWSC. On 1st December 2010, the Runda Police destroyed the Petitioner's water pipes and construction material and took equipment.
5. The Petitioner complains about the pricing and general management of water services by Runda Water. He avers the water supplied is more expensive and of lower quality than that provided by NCWSC. He contends that he is entitled to be supplied with water from a company of his choice and the acts of interference by the Respondents amount to a violation of the *Consumer Protection Act* and article 46 of the *Constitution* which protect consumer rights.
6. The Petitioner avers that the 2nd Respondent has come up with rules which interfere with his construction and operations. Although he is not a member of Runda Association, he states that the rules are imposed on him and are notified through notices and posters within Runda Estate and its environs. The Petitioner avers that the Respondent proscriptions are draconian. These regulations include the following;
 - No construction on weekends from Saturday 1 pm to Monday 7 am and public holidays.
 - No trucks on weekends from Saturday 1 pm to Monday 7 am and public holidays.
 - No vehicles over 7 tonnes, no matatus, no boda boda allowed.
 - All trucks must have a gate pass.
 - No loitering, dumping or burning of rubbish.
 - Maximum speed limit of 30 kph.
7. The Petitioner complains that the Respondents have placed barriers throughout Runda Estate making free access to vehicles impossible. He decries the fact that vehicles delivering construction material to his property have been detained and a penalty demanded by the respondents before the vehicle is released. As a result of the impediments imposed by the Respondents, the Petitioner avers that his construction has been delayed. Mr Njomo, counsel for the Petitioner, urged that the erection of barriers and obstruction of the Petitioner's right of way contravene sections 49 and 53 of the *Kenya Roads Act* and section 15 of the *Public Roads and Roads of Access Act*.
8. On the whole, the Petitioner's case is that his construction work has been inconvenienced, he has suffered loss and damage and his right to use and enjoy his property protected under article 40 has been violated by the respondents. The Petitioner maintains that he should not be compelled to join Runda Association whose membership is entirely voluntary and to coerce him to join the association either directly or indirectly is a violation of his freedom of association guaranteed under article 36 of the *Constitution*. Mr Njomo supported the Petitioner's case by written submissions. He urged the court to allow the Petition.
9. When the matter came up for hearing on 17th December 2013, I directed the parties to explore amicable settlement in light of the court's obligation under article 259(2)(c) of the *Constitution* which mandates the Court to promote alternative dispute resolution. I also issued interim relief on the following terms;



1. The Petitioner shall have reasonable access at reasonable times to his residence/suit property for construction purposes through authorised access points to the Estate.
 2. The Petitioner shall pay to the Estate the requisite monthly security charges.
10. As the parties did not agree on a settlement of the matter, it proceeded for hearing. Mr Njomo urged the Court to be guided by the reliefs the court granted in a related matter [Prof Wafula Masai v Runda Water Limited](#), Nairobi Petition No 492 of 2013 (Unreported) where I made the following orders in relation to a dispute between a resident constructing on his property and Runda Water.
- i. The Petitioner shall be at liberty to apply and the Respondent shall consider the Petitioner's application for water connection.
 - ii. The Petitioner as a member of the Runda Association shall only be subject to and charged any levies applicable to all the members of the Association.
 - iii. Subject to the Petitioner following the Rules of Runda Association, the Respondent is restrained from interfering with the Petitioner's construction on LR No 7785/491.
 - iv. Either party shall have liberty to apply for further and other orders.
11. Mr Njomo however submitted that in addition to resolving the Petitioner's grievances the Court should address the constitutional issues raised as they are matters of public interest.
12. Mr Bwire, the Respondents' counsel, accepted the decision in [Prof Wafula Masai v Runda Water Limited \(Supra\)](#) as resolving the Petitioner's case. He however contended that the provision of water services was governed by the [Water Act](#) as Runda Water was a licenced water service provider with statutory obligations. He rejected any suggestion that there was a breach of article 46 of the [Constitution](#).
13. I agree with the parties that the matter maybe resolved on the same terms as [Prof Masai v Runda Water Limited \(Supra\)](#). However, it is important to address the issues raised by the Petitioner in order to put to rest his grievances but before I proceed to do so, I think it is proper to settle the issue of the Petitioner right to construct on his premises as I think this is the basis of the dispute between the parties.
14. Cleopas Agingu, the commercial manager of Runda Water, in his deposition sworn on 11th November 2013 states as follows;
- [4] That notwithstanding that the applicant had applied for a change of user from the Nairobi City Council the said was issued 'subject to compliance with the approved zoning policy' the proposed development was not approved by the 2nd Respondent or at the minimum notified to them.
 - [5] That as is clearly shown The advertisement was made in the year 2002 whereas the notification of approval for development permission suspiciously made a whole nine years later on 23.06.2011 contrary to section 33(2) and 34 of the Physical Planning Act disclosing mischief for which the 2nd Respondent has resisted.
15. The Respondents resisted the Application for change of user through two letters; the first is dated 9th October 2008 and was addressed to the Town Clerk and the other one dated 4th May 2011 addressed to the Director of City Planning. It is not clear what further steps were taken by the Association to oppose the change of user or construction permission. As no step was taken in that regard, the development permission granted by City Council to the Petitioner remains valid until it is set aside according to the law. I would no better than repeat what I stated in [Prof Masai v Runda Water Limited \(Supra\)](#),



“[12] In this case the Petitioner had applied for and obtained the necessary approvals from the planning authority which is the Nairobi City Council. It was unfair and unreasonable to refuse the approval for connection on grounds set out in paragraph 4(ii) of the email dated 5th April 2013 on the basis of mere suspicion. The City Council approval remains valid and has not been challenged. If the Respondent or the Association wanted to challenge the approval by City Council as being inconsistent with zoning regulation, nothing would have been easier than to lodge judicial review proceedings to quash the decision or appeal the decision through the mechanisms provided under the Physical Planning Act.” I find and hold that absent a specific and direct challenge, in a manner contemplated by the law, the Respondents cannot question or cast doubt on the permission granted by the Nairobi City Council as a basis for refusal to deal with or frustrate the Petitioner’s intention to develop his property.

16. I now turn to the issue of provision of water. Delivery of water services is governed by the Water Act, 2002. It is not disputed that Runda Water was appointed a Water Undertaker or Water Service Provider (“WSP”) by Gazette Notice No 456 dated 6th February 1975 to supply water exclusively to the area covered by LR No 7785 and Nairobi Block 112. The Water Services Regulatory Board (“WASREB”), the water services regulator under the Water Act, 2002, approved the service provision agreement for Runda Water on 20th January 2010 for a period of 5 years within the area of its exclusive jurisdiction.
17. According to the deposition of Cleopas Agingu, the issue of supply of water to residents of Runda Estate by NCWSC was raised and was the subject of correspondence to the Athi Water Services Board (“AWSB”). AWSB is established under section 51 of the Water Act, 2002 to oversee the efficient and economic provision of water by WSP’s within the region. The matter was then referred to WASREB for resolution and by a letter dated 27th March 2012 AWSB was informed that it was in breach of its licence by allowing NCWSC to intrude into areas supplied by Runda Water. The letter stated as follows;

Having received and perused the map provided, the licensee is in breach of the licence conditions:

- a. By allowing the Nairobi WSP to encroach on the Runda WSP.
- b. Nairobi WSP does not have the legal power and authority as per section 55 of the Act to provide water in the area provided and thus the licensee is sanctioning an illegality.
- c. There are huge swathes of Nairobi County that the Nairobi WSP is not serving and it is an inefficient and misdirection of public resources for the WSP to divert water and venture into Runda’s exclusive area where there is already service, to serve 9 households.

As a result of the finding, AWSB was ordered, “Direct and enforce the direction that Nairobi WSP ceases to encroach on the demarcated area of another WSP.”

18. A consequence of the direction by WASREB to AWSB was that by a letter dated 4th April 2012 NCWSC was directed to cease supplying water to individual customers within the area covered by Runda Water. It is for this reason that the Petitioner was disconnected from NCWSC.
19. In summary, I have outlined the statutory scheme enacted for the provision of water within the country. Each WSP has exclusive jurisdiction to supply water within a specific area and is licenced as such. It follows that the Petitioner has no right to receive water from NCWSC or any other water company of his choice and this Court cannot vary the term of Runda Water Service Agreement for his benefit. As the Petitioner’s property falls within LR No 7785, he is entitled to apply to Runda Water for the connection and as Mr Bwire conceded Runda Water will be happy to supply water to him. I



would add that each WSP is licenced on condition that it meets standards of water quality and its tariffs are approved by WASREB through a process of public participation.

20. The Petitioner has anchored his case on article 46 of the Constitution which provides as follows;

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- (1) Consumers have the right—
 - (a) to goods and services of reasonable quality;
 - (b) to the information necessary for them to gain full benefit from goods and services;
 - (c) to the protection of their health, safety, and economic interests; and
 - (d) to compensation for loss or injury arising from defects in goods or services.
- (2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.
- (3) This article applies to goods and services offered by public entities or private persons.

21. The Water Act, 2002 which provides for the maintenance of quality of the water and regulation of tariffs and is thus consistent with the objects of article 46. In essence, the intent of the Water Act, 2002 is to provide quality water at reasonable cost to consumers. The Petitioner has made vague complaints about the cost and quality of water provided by Runda Water but he has not lodged any complaint with WASREB or AWSB which have statutory authority to deal with complaints of that nature. The Petitioner has not established any violation of article 46. I further find and hold that the Petitioner is required to source his water from Runda Water as the exclusive WSP for the area.

22. Regulation of access to roads is matter regulated by the Nairobi City County by-laws and the regulations issued by Kenya Urban Roads Board under the Roads Act. Both public bodies have powers to enforce their authority and ensure compliance with the conditions imposed on any development. I therefore decline to enter into a constitutional inquiry whether or not the conduct alleged is a violation of the Constitution. Not every breach of a by-law or regulation results in breach of the Constitution or requires that the Court addresses it as such. Statutory bodies charged with the responsibility of enforcing laws ought to be given an opportunity to exercise their authority before the Court intervenes to resolve the matter on the basis of the Constitution.

23. In this case, I have not seen any complaint lodged by the Petitioner with either the Nairobi County or the Kenya Urban Roads Board. Neither has the Petitioner alleged that these bodies have refused, failed or neglected to act on the Petitioner's complaints. In his deposition, the Petitioner has referred to general complaints in newspapers about the conduct of the Respondents but these reports cannot form the basis of statutory action or a case. In the circumstances I decline to make a finding on the constitutionality of the breach of statutory regulations.

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 his concern of access. The Petitioner is not a member of the Runda Association but 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 the members of the Association for the services which he receives. To insist that he pays for commons services provided to all residents is not a violation of his freedom of association protected under article 36 of the Constitution.



25. Mr Njomo submitted that the Petitioner is entitled to damages prayed for at paragraph 25 of the Petition as a result of the illegal and unconstitutional acts perpetrated by the respondents. The Petitioner claims that he has suffered loss and damage amounting to Kshs 4,848,423 being water connection charges, the cost of development plans approved which he has not implemented, inflation and increase in cost of materials due to related construction, opportunity cost and the cost of re-preparation of the site and remobilization of the contractor and workers.
26. Although the amount is pleaded in the Petition, I have perused the affidavit in support of the Petition which constitutes the evidence and it is clear that the claim is not supported by any documentary evidence, expert reports and assessments regarding the basis, nature and extent of loss and damage. The Petitioner must furnish specific evidence of his loss and damage. The claims made in paragraph 25 of the Petition are not proved and are dismissed.
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 provisions for certain services. 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.
28. At the end of the day the duty of the Court is to do justice to the parties. I have considered the parties' pleadings, depositions and submissions and as a result, I am of the view that the Petitioner's grievances are best resolved by issuing the following orders;
 - a. The Petitioner shall be at liberty to apply and the 1st Respondent 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 rules governing the residents of the Estate, the Respondents are restrained from interfering with the Petitioner's construction on LRNo 7785/334.
 - d. Either party shall have liberty to apply for further and other orders.
 - e. There shall be no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JANUARY 2014.

D.S. MAJANJA

JUDGE

Mr Njomo instructed by Kamotho Njomo and Company Advocates for the petitioner.

Mr Bwire instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the respondents.

