



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 492 OF 2013

BETWEEN

PROF. WAFULA MASAI.....PETITIONER

AND

RUNDA WATER LIMITED.....RESPONDENT

JUDGMENT

1. The petitioner is the owner of all that piece of land known as **LR No. 7785/491**. It is situated in the up-market suburb known as Runda within Nairobi.
2. The petitioner's complaint is set out in the petition dated 9th October 2013 and his supporting affidavit sworn on the same day and is as follows. After acquiring the land he engaged an architect who designed plans for a main house, domestic servant's quarter and gym. The plans were submitted to the Nairobi City Council and approved by the letter dated 12th April 2007. He therefore commenced construction.
3. The petitioner avers that when he started building in 2012, he encountered problems. His trucks ferrying material to Runda Estate were detained by the respondent who insisted that he pays fees in order to access the estate which has barriers along the road. The petitioner was then informed that he could not transport building materials across barrier unless he became a member of Runda Residents Association. He was also required to get his water supply from Runda Water, the respondent.
4. The petitioner applied accordingly and with the application, he submitted the architectural plans and City Council approval authorising the construction works. The application was followed by a series of meetings and email exchanges between the Runda Association Committee Members and the petitioner. This culminated in an email dated 5th April 2013 in which the Association communicated to the General Manager of the respondent as follows;

**RE: APPLICATION FOR WATER CONNECTION FOR L.R. 7785/491 MEADOWS
(PROF. WAFULA MASAI)**

Subsequent to our letter requesting the above applicant to meet and clarify the development on this property, the meeting was held with the development sub-committee members on Wednesday 3rd April 2013 and the following was observed and concluded:-

- i. *The development is advanced and roofing has commenced.*
 - ii. *The sub-committee was not satisfied that the “gym” and “dsq” structures will be used for the purpose indicated, since the design and placement is unusual and raises suspicion that these structures will be used as guest houses.*
 - iii. *As a result, the development sub-committee is not able to grant approval for water connection.*
5. As a result, Runda Water did not connect the applicant and the decision led to an impasse between the petitioner and the respondent leading to the filing of the petition.
 6. Before I heard the matter, I requested the parties to pursue an amicable settlement as I felt that it was a matter that could be dealt with in the spirit of **Article 159(2)(c)** of the Constitution which mandates the court to promote alternative dispute resolution. I therefore made the following order on 17th December 2013;

Having heard the petitioner and considered the pleadings, I think this is a matter that ought to be resolved. The parties are to agree on a settlement and pending the said settlement;

- a. *The petitioner shall have reasonable access to his residential premises through authorised access to the Estate*
 - b. *The petitioner shall not be restrained from bringing to his residence construction material at reasonable times within the Estate*
 - c. *The petitioner shall pay fees to the Estate for security monthly”*
7. At the time of hearing the matter, the issues were unresolved. I have heard submissions from counsel for both parties. Mr Njomo for the petitioner concedes that at this stage and as a result of the orders I issued on 17th December 2013, the petitioner has continued having access to the property, he is able to continue construction but source water from third parties. He submits that the petitioner is facing unwarranted charges and levies being imposed on him and unreasonable conditions on access to his property thereby violating the petitioner’s right to use and enjoy property under **Article 40** of the Constitution.
 8. Mr Bwire, counsel for the respondent, concedes that Runda Water is prepared to supply water upon an application being made. As regards the charges, he submits that the charges levied are common to all the residents of Runda Estate and are applied towards maintenance of common services such as security and lighting.
 9. I have considered the facts and submissions in light of the prayers sought in the petition. In my view, the prayers in the petition cast the net wide to resolve the particular problem between the parties. I will consequently apply my mind to doing justice to the parties by granting an appropriate remedy as is required of me under **Article 23** of the Constitution to resolve what I consider the real issues in dispute. However, before I tie up the matter, I wish to deal with the letter dated 5th April 2013 which I have set out at paragraph 4 above.
 10. Mr Bwire correctly submitted that Runda Estate is a zoned area that has controlled development hence the area residents have an interest in maintaining the standard of buildings and the quality of the surrounding environment. But can the petitioner’s membership of Runda Association or application for water connection be rejected on the basis of the letter of 5th April 2013? I think not.
 11. By exercising authority which affects the use and enjoyment of property, Runda Water and Runda Association are exercising public authority over land owners within the area which makes the amenable to the Constitution and its values and the Bill of Rights. In so far as Runda Water approves whether a resident can be supplied with water and in this case, whether the resident can continue to build, it is subject to the standards in **Article 47(1)** which provides that *“administrative action shall be expeditious, efficient, lawful and procedurally fair.”*

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*.

13. Of course it must not be lost to the petitioner that he would be required to follow the rules governing the areas residence when he completes construction. In my view it was premature and unreasonable for the Association to raise suspicion on the use of the property as a reason to deny him water connection.

14. I therefore find and hold that the respondent violated the petitioner's right to fair administrative action under **Article 47(1)** by complying with the unreasonable and unfair determination contained in the letter/email of 5th April 2013.

15. I now turn back to the reliefs that should issue in light of the foregoing and the concessions made by parties. In order to do justice to the parties, I make the following orders;

- i. **A declaration be and is hereby issued that the petitioners' rights under Article 47(1) was violated by the respondent complying with the unfair and unreasonable decision contained in the letter of 5th April 2013.**
- ii. **The petitioner shall be at liberty to apply and the respondent shall consider the petitioner's application for water connection.**
- iii. **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.**
- iv. **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.**
- v. **Either party shall have liberty to apply for further and other orders.**
- vi. **There shall be no orders as to costs.**

DATED and DELIVERED at NAIROBI this 28th 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 respondent.