



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION CASE NO. 7 OF 2018

JAMES NJOROGE MWANJI.....PETITIONER

VS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. **JAMES NJOROGE MWANJI** (the petitioner) has petitioned this Court seeking the following orders:-

- (a) The honourable court will be pleased to order payment of General Damages to the petitioner.
- (b) The honourable court issue an order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the health of the petitioner and his family.
- (c) The honourable court issue an order to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment around the petitioner's home.
- (d) The honourable court do issue an order for compensation to the petitioner for being a victim of a violation of the right to clean and healthy environment.
- (e) The honourable court will be pleased to issue any other order it deems fit, fair and just.
- (f) The matter to be brought up for mention in one month before this honourable Court after the date of judgment to confirm compliance with the orders issued.
- (g) The honourable court to issue an order that each party bear its own cost.

2. The grievances of Mwanji stems from what he says is the police failure to respond to his complaints. This is how he terms it in his petition:-

“The matter is about failure by police to respond to complaints by the petitioner about a group of people who had surrounded his home, and were pelting his home with the poison. The same people came the following day and continued to pelt the petitioner's home with the same poison. They have continued to do this for five years now.”

3. The petitioner has brought this action against the Inspector General of Police and the Attorney General. The petitioner has also filed this action on his own behalf and on behalf of his family, who were unnamed in the petition. The petitioner gave the following as the factual background of this matter:-

“The petitioner avers that, between June 2013 and January 2018, his home in Tinganga Kiambu County has been under attack by people who pelt chemicals at the home. The poison is toxic, abominable and it is also radioactive. They shoot it from 50 feet away. Sometimes it chokes, other times it burns, other times it causes diarrhoea and other times it causes signs of fever. It causes

pain and suffering. Red roofing files have been stained black, and a metal gate securing the petitioner's home is rotting. A strong smell fills the home throughout the year. The first time I reported this to police was April, 2014, and again in August, 2015. On both incidences, the police failed to respond."

4. The petitioner alleged that as a consequence of non-action by the respondents, his fundamental freedoms under the Bill of Rights have been violated. The petitioner cited Articles 20, 21, 22, 26, 27, 28, 29, 42, 43 and 70 of the Constitution as representing his right that had been violated.

5. The petitioner pleaded that as a consequence of the respondent's failure to observe, respect and protect his rights and freedoms, he and his family have suffered both psychological and physical "debilitation". Further, that that petitioner's home has been ruined and he requires Kshs.23 million to "replace" it and Kshs.10 million for each of the six members of his family to enable them seek comprehensive medical treatment.

6. The Attorney General, the 2nd respondent filed grounds of opposition to the petition. Those grounds are eleven. In summary the 2nd respondent faulted the petition on the grounds that the petitioner failed to demonstrate the violation by the respondents of his constitutional rights, that the petitioner failed to give notice to the respondents as required under **section 13A** of the **Government Proceedings Act (GPA)**, and that "the prayers sought in the petition are unqualified, inapt and unmerited."

ANALYSIS

7. I will begin by considering the ground by the respondent, that the petitioner failed to give the Attorney General notice as required under **Section 13A GPA**. That section provides:-

"(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars -

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction."

8. That **Section 13A** has been the subject of determinations by the courts and I will therefore not re-invent the determination of that Section because I wholly approve those decisions.

9. I begin by citing a decision by *Justice G.V. Odunga*, where the learned Judge cited the decision of *Justice Majanja* in the case **KAMUMU CONTRACTORS LIMITED VS. COUNTY GOVERNMENT OF MACHAKOS (2019) eKLR** thus:-

"13. With respect to the second issue, in interpreting the constitutionality of section 13A (1) of the Government Proceedings Act, Majanja, J in KENYA BUS SERVICE LTD & ANOTHER VS. MINISTER FOR TRANSPORT & 2 OTHERS (2012) eKLR expressed himself as follows:-

14. According to the learned judge:-

'The provisions for demanding [prior notice before suing the Government is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example Order 3 Rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.'

15. The learned judge then concluded that:-

‘Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the GP provides no impediment to access to justice. Where the state is at the front, left and centre of the citizen’s life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that Section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of the Article 48.’”

10. The Court of Appeal while considering an appeal where the High Court had struck out a suit for failure in giving notice under **Section 13A GPA**, that is, in the case **DAVID NJENGA NGUGI VS. ATTORNEY GENERAL (2016) eKLR** while approving the decision of Justice Majanja, stated:-

“It is clear that a suit that has been filed without full compliance with section 13A cannot be said to be incompetent nor can it be rightly struck out.

Its competency or otherwise is dependent on considerations of section 13A (supra). It cannot be good law to hold that section 13A which is merely directory, can be regarded as imperative so as to render a competent suit incompetent for failure to fully comply with it.

15. The learned Judge of the High Court in striking out the suit went into error. Procedural rules and directory provisions of the law even where their peremptoriness is clear and unambiguous cannot vitiate a cause action and the right to sue. In the instant case, the use of the word “shall” in Section 13A (supra) does not import “mandatoriness”. It is directory and procedural. The appeal depicts the period prior to the 2010 Constitution. The 2010 Constitution now binds courts by dint of Article 159 (2) (d) in exercising judicial authority to administer justice without undue regard to procedural technicalities.

*16. We have perused the judgment of the High Court in the case of **KENYA BUS SERVICE LTD & ANOTHER V. MINISTER FOR TRANSPORT & 2 OTHERS [2012] eKLR** where, inter alia, the constitutionality of section 13A of the Government Proceedings Act (GPA) was challenged for being in contravention of Article 48 of the Constitution...*

Manjanja J. who heard the matter examined a wide range of international, historical and comparative perspectives of similar statutes of limitation of actions against the Government and other public Authorities...

18. This decision though merely persuasive is entitled to respect.”

11. The above discussions goes to show that the respondents’ ground that this petition should fail for there being non-compliance with Section 13A of the GPA is incompetent and is rejected and this petition therefore survives that challenge.

12. The petitioner however bore the burden to prove what is contained in his pleadings. He needed to prove that, indeed poisonous substance has been “pelted” on his home. There was no such evidence before court. It was not enough for the petitioner to provide three photographs of the roof of a house and of a rusting metal (which he stated was his gate).

13. The petitioner also needed to prove that he has reported the attacks to the police and they failed to act. It was not enough for him to bring a piece of paper with the writing as follows:- “OB 16/1/8/2015 at 08:00 hrs”. The petitioner should have brought to court an extract of that occurrence book (OB) report to prove to this Court that it related to his complaint before court. There is certainly no evidence before court, as deponed by the petitioner, that his home has been attacked every day “every night on a 24 hour basis for 5 years and 3 months.” Nor is there evidence before court that the attackers are members of ‘Mungiki’. Nor is there evidence that the members of ‘Mungiki’ were pelting the petitioner’s home with, “TB Bacteria, cholera, flu virus, body specimens, radioactive materials, wood preservatives, heavy metal and evil smelling organophosphates like malathion and sarin.”

14. The petitioner provided hospital invoices both of local and international hospitals, which are in his name. He also attached radiology report dated 25th February, 2016. Those however do not prove that the ailment the petitioner was treated for bear any correlation to the alleged poisoning of his home.

15. The petitioner having made very serious allegations against the police and unknown people needed to prove his allegations on a balance of probability. This is what **Section 107** of the **Evidence Act Cap 80** provides:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

16. The petitioner needed to satisfy this Court that the event he set out in his petition occurred and the effects of those events are evident. This is what was discussed by Justice John M. Mativo in the case of **EVANS KIDERO VS. SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY & ANOTHER (2018) eKLR** thus:-

*“32. In **HORNAL VS NEUBERGER PRODUCTS LTD** it was held that in civil proceedings the standard of proof is that of the balance of probabilities, even where the allegation is one of fraud. However, as the court pointed out in the said case the standard is not inflexible; because the degree of probability required to prove an allegation may vary with the seriousness of the allegation. Lord Nicholls of Birkenhead explained this at greater length in *Re H and Others (Minors)*:-*

‘The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.’

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”

17. The petition, in view of the above finding is incompetent.

DISPOSITION

18. In the end, the petition is dismissed with no orders as to costs.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 1ST DAY OF JULY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For James Njoroge Mwanji : Present

For Respondents : no appearance

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE