



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CONSTITUTIONAL PETITION NO. 5 OF 2019

TIFFANY WANG'ERI NJUGUNA.....PETITIONER

VERSUS

WILSON GIKONYO KIMANI

(Sued as the Chairman of the New World Garden Estate).....RESPONDENT

JUDGMENT

1. **Tiffany Wang'eri Njuguna**, the Petitioner, is a resident of **New World Garden Estate**, a gated community residence within Kisaju in Kajiado County. As members of the gated community, they are required to pay service charge for purposes of administration and provision of common services within the estate.
2. The Petitioner avers that sometime in 2014 the management of the estate sought to increase service charge from Ksh. 2,000/= to 4,500/=, a sum she contends was exorbitant and sought explanation and statement account which was ignored. As a result, she avers, she declined to pay the new charge amount and contends that the service charge did not include water and electricity bills which are paid separately.
3. The Petitioner avers that on or about 17th November 2018, the respondent directed the caretaker to disconnect water supply to her premises without any justification for the action forcing the Petitioner to source water supply from external sources and that even the external water supplier was denied entry at the main gate since watchmen could not open the gate for them. This, the Petitioner contends, violated her rights and fundamental freedoms as it denies her access to clean water.
4. On the basis of the factual position, the Petitioner filed this Petition and sought the following reliefs:

(a) That the Honourable court declares that the actions of disconnecting water and denial of access to water as done by the respondent amounted to a violation of human and constitutional rights of the petitioner.

(b) General damages for the suffering occasioned by the respondent's action

(c) Costs of the petition

Response

5. The respondent filed a response dated 5th March 2019, contending that the petitioner is a member of a gated community with a set of by laws and regulations which govern the organization and conduct of residents as members of the community. The respondent states that members pay service charge of Ksh. 4,500/= which is used for borehole maintenance, security common areas lighting, cleaning and garbage collection among other common services. The respondent further contends that the petitioner paid Ksh. 1,000/= on 5th November 2018 towards service charge, a confirmation that she was aware of her obligations but declined to pay the required amount or the arrears which she is aware of.
6. It is the respondent's case that the CBO took over management of the borehole since October 2010; that it has been making payment to the Developers for water. The respondent contends that the petitioner's refusal to pay service charge disentitled her use of water from the CBO and that the decision to disconnect water to her premises was a collective community action as she could not enjoy services without paying for them. It is the respondent's further case that the petitioner is intent on circumventing the community's regulations. The respondent contends that ever without paying service charges, the petitioner still enjoys services such as garbage collection and security at the expense of other community members. The respondent denies that there has been violation of the petitioner's rights or fundamental freedoms.

Petitioner's Submissions

7. Miss Makori, learned counsel for the Petitioner, made oral submissions arguing that the respondent unlawfully disconnected the water to the petitioner's premises even though she had paid her water bills; that water was disconnected on the instructions of the Chairman of the residents and that if at all there was a dispute, it should have been resolved in any other way other than through disconnection of water to her premises.

8. Learned Counsel argued that the petitioner's attempts to have water delivered to her premises by a private supplier was also frustrated in that the provider was not allowed access when the guards refused to open the gate. She urged the court to allow the petition and direct the respondent to reconnect water to the petitioner's premises.

Respondent's Submissions

9. Mr. Kamau, learned counsel for the respondent, submitted highlighting their written submissions dated 29th March 2019, that the relationship between the Petitioner and respondent is contractual with regard to supply of water and other services and that the respondent is governed through by laws and resolutions made by members in their meetings. According to counsel, the petitioner is required to pay Kshs. 4,500/= service charge per month which goes towards provision of common services such cleaning of common areas, lighting security services and alarm system.

10. Learned Counsel submitted that the petitioner has not been paying service charge since 2013; that service charge is paid together with water bills and that water is treated using the money from the service charge. Mr. Kamau contended that when the community took over water supply from the Developer, they had to pay Kshs. 50,000/= to be allowed to supply water to members within the community. He further contended that water bills include water uptake by an individual which has a bearing on the electricity which is reflected in the monthly bills. He submitted that the petitioner was notified of the service charge following meetings of the CBO which she declined to attend despite being notified.

11. He submitted that invoices were sent to the petitioner but she declined to pay leading to disconnection of water to her residence. According to counsel only water from the CBO was disconnected and that the petitioner is free to get water from the developer or any other source; that the respondent was ready and willing to reconnect water once the petitioner complies with the terms and conditions the CBO or the petitioner can source water from outside sources/suppliers. He maintained that the petitioner would have to get water into her premises through the back gate since security guards cannot open for her since she does not pay for their services. He denied that the petitioner's rights and fundamental freedom had been violated since the respondent has no constitutional obligation to supply her with water without paying for it.

Determination

12. I have considered the petition, the response, submissions and authorities relied on. The issue raised in this petition is whether the respondent has violated the petitioner's rights and fundamental freedoms in its action of disconnecting water to the petitioner's residence.

13. The facts of this petition are straight forward. The petitioner is one of the residents within a gated community where services are shared but paid for by members in form of service charge. Some of the common services include security, cleaning and lighting within the estate. The money paid for service charge is Ksh. 4,500/= per member per month. The petitioner has not been paying the service charge leading to disconnection of water from the common source to her residence. That action prompted her to file this petition contending that her right to clean water has been violated.

14. The respondent has on its part argued that it has no constitutional obligation to supply the petitioner with water free of charge. It has also contended that the petitioner is free to source water from independent suppliers including the Developer and does not, therefore, have to depend on the respondent if she is not willing to pay service charge. It has also argued that the petitioner can have water delivered to her premises through the back gate as guards cannot open for her because she does not pay for their services.

15. The Bill of Rights guarantees every person's rights and fundamental freedoms Article 19 is clear that rights belong to individuals and are to be enjoyed to the fullest extent. Article 43, on the other hand, guarantees everyone's right to among others, clean and safe water in adequate quantities. This right is to be enjoyed as it has a foundation to the enjoyment of other rights. Without clean and safe water, the right to life cannot be realized and so is the enjoyment of other rights.

16. It is a cardinal principle in constitutional litigation that to establish a cause of action in a constitutional petition, the petitioner must show much more than merely stating that his or her constitutional rights have been violated. The petitioner must show, first, that s/he enjoyed a constitutional right; second, that the right had been violated and, third; that the defendant is liable for the said violation. (See ***Elizabeth v President of the Court of Appeal*** (2010) SLR 382)

17. The petitioner resides in a gated community. According to the respondent, and this has not denied by the petitioner, residents in that community have obligations and requirements that they have to meet and abide by in order to get certain communal services. One of the requirements is payment of service charge which enables residents get common services including treated water from the borehole which is supplied to those residents who have met their obligations.

18. The petitioner, though a resident, conceded that she has not been paying service charge of Kshs. 4,500/= a clear indication that she is not met her obligations as a resident, a fact that led to the disconnection of water to her residence. Can that be said to be a violation of her rights?

19. In my considered view, the answer must be in the negative. The petitioner lives in a community with rules and regulations. All other members oblige and meet their obligations. The petitioner having opted not to follow the regulations, she must have driven herself out of the right to get common services including water from the common source. Her right to water from the common source was founded on her

meeting the contractual obligations to pay service charge. Payment of service charge would put her in a position to demand common services from the respondent, including the right to get water from the common borehole otherwise she may not rightfully demand and consume water she does not pay for given that there is much more the service charge does for the benefit of the community than just water.

20. A party has a right to file a constitutional petition seeking remedies arising from violation of fundamental rights and freedoms, and the court has jurisdiction under Article 165(3) (b) as read with Article 23, to determine whether a right or fundamental freedom in the Bill of Rights of the petitioner has been denied violated or is threatened.

21. In the present petition, the petitioner has not demonstrated that the respondent owes her a constitutional right and that the respondent has violated that right to bring her within the scheme of Articles 23 as read with Article 165. What is clear, however, is that it is the petitioner who has failed to meet her obligations to the community for purposes of enjoying the common services including supply of treated water from the borehole under the management of the community.

22. The respondent has contended that the petitioner can source water from private suppliers and indeed the petitioner argued that she has been forced to get water from a different source. This, in my view, is the only reasonable option available to the petitioner given that she has declined to meet her obligations towards common services available to members of the community.

23. There is also the contention by the petitioner that private water suppliers she contracts to deliver water to her residence are denied entry through the main gate by guards. The respondent has argued that since the petitioner does not pay for the guards' services they cannot open for her. The respondent has also contended that the petitioner can still get water through the back gate which she has been doing.

24. Security is one of the common services that members pay for through the service charge. The petitioner does not pay for the guards' services and she should not, therefore, expect to enjoy their service free of charge. Security is for the common good and if the petitioner does not appreciate its value and pay for it, why should she enjoy it? This is not a right guaranteed to her by the constitution from the respondent. It is a contracted service provided to those who pay for it. The respondent has contended and it is not denied, that there is another get through which those bringing water to the petitioner's residence can go through. This is confirmation that the petitioner has not been completely locked out or denied access to her premises. The petitioner can also open the gate for herself but cannot demand that the guards open for her.

25. I must point out that a person approaching the court by way of a constitutional petition claiming violation or threat to violate rights and fundamental freedoms has, a duty to establish actual violation or threat to violate fundamental rights and freedom guaranteed by the constitution. A party should not invoke constitutional jurisdiction of the court even where there is no basis for it. In ***Benard Murage v Fine serve Africa Limited & 3 others*** [2015] eKLR, the court observed that not each and every violation of the law must be raised before the High Court as a constitutional issue.

26. Further, in ***Harrkinson v Attorney General of Trinidad and Tobago*** [1980] AC 265, it was stated that;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individual by...the constitution is fallacious. The right to apply to the High Court under... the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court ... 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.”

27. I entirely agree with the above proposition of the law. The petitioner as a member of a gated community is subject to the terms and conditions governing that community and will enjoy common services subject to the terms applicable to all members. Any dispute should be resolved in accordance with the terms and conditions upon which services are provided. Indeed where a member is genuinely aggrieved, that member may approach the court for resolution of the dispute but not through a non- founded constitutional petition by invocation of constitutional provisions.

28. There must be a link between cited constitutional provisions and the alleged violations. It was in this regard that the Supreme Court observed in ***Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*** [2014] eKLR, that the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

29. This court, moved under the Articles of the constitution, will only act or intervene where it is shown that a respondent is indeed violating the constitution and the law, or that there is a real threat or imminent danger to violate the constitution, the law or rights and fundamental freedoms of a petitioner. However, as it is, and from the petitioner's own admission, there is really no fault on the part of the respondent and I find none myself, a confirmation that there was no violation of rights or fundamental freedoms of the petitioner.

30. Taking into account the totality of the facts of this petition, considering the evidence, submissions and the law, the conclusion I come to is that this petition is plainly unmeritorious and cannot stand. Consequently, the petition dated 5th February, 2019 is declined and dismissed with costs to the respondent.

Dated, Delivered and Signed in open court this 6th day of May, 2019.

E C MWITA

JUDGE