



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 80 OF 2018**

**E-TALK WIRELESS LIMITED.....PETITIONER**

**VERSUS**

**CABINET SECRETARY OF MINISTRY OF FOREIGN**

**AFFAIRS AND INTERNATIONAL TRADE.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. ***E-Talk wireless Limited***, the Petitioner, is a limited liability company engaged in the distribution of Safaricom products. It filed this Petition against the Cabinet Secretary, Ministry of Foreign affairs and International Trade and the Hon. Attorney General, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively claiming violation of its constitutional rights.

2. The Petitioner averred that on or about 29<sup>th</sup> June 2011, officers from the United Nations High Commission for refugee (herein The **UNHCR**), raided its premises using bulldozers registration Nos. **62UN41K** and **62UN142K** driven by **Mr. Abdulahi Hussein Sheikh** and another unidentified driver, who conducted an operation aimed at demolishing structures that were alleged to be on the road to the **Dadaab Refugee Camp** and in the process destroyed the Petitioner's shops, merchandise and sale proceeds. The Petitioner stated that by virtue of this unlawful action by The **UNHCR**, its goods were damaged, looted and lost and nothing was salvaged.

3. The Petitioner further averred that immediately after the stated illegal and unlawful actions, the Petitioner undertook an assessment on the loss of business and assets which came to **Kshs. 4,697,000/=**, The Petitioner stated that prior to and or during the said illegal demolition exercise, neither the government of Kenya nor The **UNHCR** personnel served it with any warning or demolition notice on the impending demolition exercise and that its premises were not part of the premises earmarked for demolition because they were private property.

4. It is the Petitioner's case that it reported the matter to the police and wrote a letter to the 1<sup>st</sup> Respondent on 14<sup>th</sup> July 2011 seeking assistance of the Ministry in mediating the dispute to reach an amicable settlement; that it further wrote a letter through its advocates to The **UNHCR** Country Representative raising concerns about the demolition and loss but it was not responded and The **UNHCR** neglected to address its complaint.

5. The Petitioner stated that it again wrote demand letters to the 1<sup>st</sup> Respondent to have the matter amicably resolved but the 1<sup>st</sup> Respondent was non responsive thus violated the Petitioner's right of access to justice guaranteed under Article 48 of the Constitution. According to the Petitioner, the Respondents failed to facilitate its right of access to justice given to the privilege and immunity accorded to The **UNHCR** and its officers. The Petitioner also averred that its right to fair hearing guaranteed under Article 50(1) of the Constitution was violated. The Petitioner, therefore, sought the following reliefs:

a) ***A declaration that the failure, neglect and or refusal by the 1<sup>st</sup> Respondent to take into account the nature of the dispute, the illegal conduct UNHCR and to lift UNHCR's immunity in this specific case to allow the Petitioner to claim compensation through civil courts violates the Petitioner's right to access justice guaranteed under Article 48 of the Constitution.***

b) ***A declaration that the failure, neglect and or refusal by the 1<sup>st</sup> Respondent to facilitate the settling of the dispute since June 2011 by between (sic) the Petitioner and UNHCR amounts to violation of the Petitioner's right to fair hearing guaranteed under Article 50(1) of the Constitution***

c) ***An order of special damages under Article 23(3) (e) of the Constitution of Kenya shillings four million six hundred and ninety***

*seven (KES 4,697,000) being compensation for loss of goods and destruction of property as at July 12<sup>th</sup> 2011(date of valuation) plus interest thereon at average commercial bank rates from the said date until payment in full.*

*d) An order of general damages under Article 23(3)(e) of the Constitution in favour of the Petitioner as against the 1<sup>st</sup> Respondent being compensation for the state's violation rights under Articles 48 and 50(1) of the Constitution.*

*e) Costs of the suit and interest thereon from thereon from the date of filing the Petition until payment in full.*

#### ***Respondents' response***

6. The Respondents filed grounds of opposition dated 18<sup>th</sup> January 2018 and filed in court on 21<sup>st</sup> January 2018 opposing the Petition. They contended that the Petition lacks basis in law; that violation of constitutional rights has not been pleaded with precision and specificity; that the Petitioner has not demonstrated any violation of rights by the Respondents and that the alleged violations were, in any case, by a body that enjoys diplomatic immunity and privileges and that therefore, the court has no jurisdiction to determine the issues in the Petition.

7. It is the Respondents' further case that under sections 9 and 11 of the Privileges and Immunities Act, as read with the Fourth Schedule to the Act, The **UNHCR** enjoys immunity and privileges from criminal and civil litigation unless the same is expressly waived; that under sections 20 and 21 of The **UN Convention on Privileges and Immunities, 1946**, The Secretary General to The **UN** has the right and duty to waive immunity of any official in a case where the immunity would impede the course of justice and that immunity can be waived without prejudice to the interests of The **UN**. The Respondents concluded, therefore, that the petition is unmeritorious and does not disclose constitutional violations on the part of the Respondents.

#### ***Petitioner's submissions***

8. Mr. Sisule, learned counsel for the Petitioner, submitted, highlighting their written submissions dated 17<sup>th</sup> January 2019 and filed in court on 18<sup>th</sup> January 2019, that the court has jurisdiction over the matter because the claim relates to violation of rights and fundamental freedoms thus Article 22 of the Constitution is applicable.

9. Counsel contended that the Petitioner's rights, including the right to property had been violated. According to counsel, the Petitioner's property such as shops at the Daadab Refugee Camp was destroyed by The **UNHCR** drivers. Learned counsel argued that failure by the Ministry to lift immunity constituted denial of the right of access to justice guaranteed under Article 48 of the Constitution. He also argued that The **UNHCR** and its employees enjoy immunity and for that reason, they could not be enjoined in the Petition; that the 1946 Convention on Immunities and Privileges of specialized agencies is applicable by virtue of Article 2(5) of the Constitution.

10. According to Mr. Sisule, Article 2 of the Constitution is clear that immunity is for principles of protecting functions of the organization but not to protect the organization's employees where they violate the law. He relied on *Karen Njeri Kandie v Alassane Ba* [2017] e KLR for the submission that immunity is functional and is limited.

11. Counsel further argued that taking into account the purpose of immunity and section 9 of the Immunity and Privileges Act which grants the minister power to grant immunity, such immunity can be granted subject to conditions which could include alternative way of dealing with disputes. With regard to this Petition, counsel submitted that the minister failed to impose conditions that The **UNHCR** should submit to alternative dispute resolution mechanism such as the one presented in this petition. He contended that failure to lift immunity effectively denied the Petitioner the right of access to justice. He contended that although the immunity is reasonable limitation, the state could lift the immunity and failure to lift it makes the limitation unreasonable because it could not affect functions of The **UNHCR**.

12. On the reliefs, counsel submitted that they were seeking declarations for violations rights, general and special damages which are justified.

#### ***Respondents' submissions***

13. Miss Gitiri, learned counsel for the Respondents, submitted highlighting their written submissions dated 18<sup>th</sup> January 2019 and filed in court on 21<sup>st</sup> January 2019, that this court lacks jurisdiction to entertain this Petition because The **UNHCR** has immunity and privileges against criminal and civil proceedings under the UN Convention and local legislation; that The **UNHCR** is not party to the proceedings; that it was not the Respondents who caused the alleged destruction; that the Respondents did not sanction the alleged violations in the form of destruction of property and that the drivers concerned are not known to the Respondents.

14. According to Miss Gitiri, the 1<sup>st</sup> Respondent was only asked to facilitate mediation; that they engaged The **UNHCR** and when they could not go far, the Petitioner approached the Respondents for assistance in mediating the dispute. Learned counsel pointed out that the Petitioner had in fact demonstrated through its pleadings the steps the Respondents took to mediate the dispute and indeed the 1<sup>st</sup> Respondent went out of its way to help in mediating the dispute as shown in the Petitioner's supporting affidavit. Counsel further pointed out that the Petitioner has clearly elaborated in its submissions how The UN specialized agencies are supposed to provide model dispute resolution methods which shows that The **UNHCR** has a mechanism for resolving disputes.

15. Miss Gitiri submitted that it is only the specialized agency, in this case, The **UNHCR**, that could waive the immunity and privileges but not the Respondents and that the Respondents cannot interfere with the workings of The **UNHCR**. Counsel argued that under sections 20-21 of the UN Convention on Privileges and Immunities 1946, The UN Secretary General has the right and duty to waive immunity of any official and that it is either The UN or the specialized agency that can waive immunity.

16. In counsel's view, there is nothing on record to show that the Petitioner attempted to have the immunity waived, and just like the Petitioner, she relied on the *Karen Kandie's* decision for the submission that the immunity and privileges is a reasonable limitation in terms of Article 24 (1) of the Constitution. Counsel contended that the Petitioner had not demonstrated that there had been violation of rights by the Respondents thus the Petitioner had not met the required burden.

17. With regard to damages, counsel argued that the Petitioner sought special damages which should be proved but the Petitioner had not adduced evidence to prove that it had suffered special damages. According to counsel, *annexure 1AA"1"* is dated 12<sup>th</sup> July 2011 yet destruction took place on 29<sup>th</sup> June 2011. Counsel further argued that there was no evidence to support the alleged destruction.

### ***Determination***

18. I have considered the Petition, the response, submissions by Counsel for the parties and the authorities relied on. The issue that arises for determination is whether the Petitioner has established a case for violation of constitutional rights against the Respondent and depending on the answer to this question; whether the Petitioner is entitled to damages it seeks.

19. The facts of this Petition are not in dispute. The Petitioner, a Limited Liability company, was operating businesses at the Daadab Refugee Camp. Bulldozers belonging to The **UNHCR** pulled down structures where the Petitioner's businesses were in what the Petitioner terms abrupt and unannounced raid and demolition. According to the Petitioner, the demolition was carried out without notice and caught the Petitioner unawares thereby destroying its business and merchandise leading to loss and damage. The Petitioner states that it tried to engage the Respondents to have it compensated to no avail necessitating this Petition.

20. The Respondents on their part have argued that this court does not have jurisdiction to deal with this matter because The **UNHCR** enjoys privileges and immunity from criminal and civil proceedings; that as the Respondents, they did not violate the Petitioner's rights and fundamental freedoms and therefore the petition cannot be granted. The Respondents further argued that the Petitioner has not proved that general damages are grantable in the circumstances of this petition and that special damages were not proved either.

### ***Whether the court has jurisdiction***

21. The Respondents' argument is that this court has no jurisdiction to determine this matter on account of the privileges and immunity enjoyed by The **UNHCR** an agency of The UN. Jurisdiction is the power or authority granted to a court to determine cases presented before it for resolution. Jurisdiction may be conferred by the Constitution the law or both. In determining whether it has jurisdiction, the court must look at the issues raised in the matter before it. Where it determines that it is without jurisdiction, it should down its tools and take no further step on the matter. See *The Owners of the Motor Vessel LILLIN "S" v Caltex Oil Kenya Limited* [1989] KLR 1)

22. I must state here that what is before this court is a constitutional petition alleging violation constitutional rights and not a normal civil claim. Article 22 of the Constitution allows a party to present a petition to this court claiming violation of rights and fundamental freedoms, while Article 23(3) grants this court jurisdiction as read with Article 165 of the constitution to determine claims of violation of rights and fundamental freedoms and may grant reliefs it deems fit.

23. Article 165(3) grants this court general jurisdiction to deal with both criminal and civil cases while Sub-Article 3 (d) (i) and (ii) grants the court jurisdiction to determine whether rights and fundamental freedoms have been violated, infringed or threatened. In that regard, this court has jurisdiction to determine any quest of a constitutional nature presented before it alleging violation, infringement or a threat of violation to rights and fundamental freedoms. I therefore don't agree with the Respondents that this court lacks jurisdiction given that what is before it is a constitutional petition alleging violation of constitutional rights and fundamental freedoms.

### ***Whether the petitioner has established a case against the Respondents***

24. Having solved the issue of jurisdiction, the question that this court must then turn to address is whether the petitioner has established a case against the Respondents. The 1<sup>st</sup> Respondent is the Principal Secretary in the Ministry of Foreign Affairs of the government of Kenya. The 2<sup>nd</sup> Respondent, the Attorney General on the other hand is the principal legal advisor to the national government and its legal representative in civil cases in which it is a party.

25. The petitioner's case is clear that the bulldozers that destroyed its property had The **UNHCR** registration plates and not those of the government of Kenya. The Petitioner further stated that the bulldozers were driven by UNHCR drivers and not those of the government of Kenya drivers. This in itself exonerates agents of the government of Kenya from blame in so far as direct and actual demolition the Petitioner's structures and destruction of its properties is concerned.

26. The petitioner's grievance, if I understood correctly, is that the government of Kenya through the Respondents did not waive immunity and privileges granted to The **UNHCR** and its employees to enable the Petitioner file a claim against The UNHCR, an agency of The UN and its employees for the wrongs committed by those drivers. The immunity was not granted by the government of Kenya but the UN Convention on Privileges and Immunities and therefore, the government of Kenya cannot waive such privilege and immunity. The immunity can be granted. The petitioner also seems to be too well aware that immunity and privilege of The UN agencies is protected by the UN Convention on Privileges and Immunities and that The Convention is clear that only The Un Secretary may waive immunity and privileges.

27. Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations and officials

of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in

connection with the Organization.

28. Further, section 2 of the UN Convention of Privileges and Immunities 1946 provides that The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity.

29. Section 20 of the Convention provides that Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves; and that The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations and in the case of the Secretary-General, the Security Council shall have the right to waive immunity.

30. On the other hand under section 21. The United Nations is to co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in the Article.

31. Section 9(1) of the Privileges and Immunity Act (Cap 179) provides that; ***“This section shall apply to an organization which the minister may, by order, declare an organization of which Kenya, or the government, and one or more foreign sovereign powers, or the government or governments thereof, are members.”*** The section further states that the minister may by order, provide that an organization to which the section applies shall, to the extent as may be specified in the order, have immunity and privileges set out in part 1 of the Fourth Schedule to the Act.

32. Section 11 of the Act which is material to this petition. provides that;

***“where the government of Kenya has, whether before or after the commencement of this Act, entered into any agreement with an external agency under which, in return for assistance or co-operation in works executed in, or services rendered to, Kenya by that agency, the government has agreed that such agency or person in its service should enjoy immunities or privileges, the minister may, by order;***

***(a) Declare that such agency is one to which this section applies;***

***(b) Provide that, to such extent as may be specified in the order, such agency shall have the immunities and privileges set out in part 1 of the Fourth Schedule to this Act”.***

33. Section 11(3) provides the manner of conferment of immunity by the minister. It states that ***“where immunities and privileges are conferred upon any person by an order under subsection (1) of this section, the Minister shall, by notice in the Gazette, specify the persons who are for the time being entitled to those immunities and privileges”***

34. The UNHCR is UN agency whose immunity was not conferred by the Minister in terms of section 11(3) of the Act. Its privileges and immunity is conferred by the Convention on Privileges and Immunities. The Petitioner has blamed the Respondents for not lifting the agency’s privilege and immunity to enable it file a suit and therefore this has violated its right of access to justice.

35. I have carefully gone through the Petitioner’s pleadings and annexures but I am unable to trace any correspondence to the Respondents or any other person requesting the Respondents or the other person to waive privilege and immunity of The UNHCR and its drivers to enable the Petitioner institute compensation claims. The correspondence by the Petitioner urged the Respondents to facilitate mediation which the Respondents say they did but The UNHCR was unwilling to get on with the negotiations. That in itself is confirmation that the Respondents did what the Petitioner asked them to do and beyond that, the Petitioner has not shown how the Respondents violated its rights of access to justice.

36. According to the Petitioner, the structures brought down were said to be on the road to the Daabab Refugee Camp. It is not clear whether or not the structures were really on the road or not given that those responsible in demolishing them are not parties to the petition and are therefore not before the court. That being the case, I do not see a cause of action against the Respondents. It is well-established principle of constitutional litigation, that in a cause of action in a claim of violation of rights and fundamental freedoms will only exist when a petitioner establishes that a constitutional right exists; that the right has been violated and that the Respondents are responsible for that violation. (*Elizabeth v President of the Court of Appeal* (2010) SLR 382).

37. The petitioner has not succeeded in doing so in this petition. The circumstances under which the alleged violations were committed do not in any way connect the Respondents and therefore they cannot be held liable either under the constitution or the law. That being my view of the matter, the conclusion I come to is that the Petitioner has not made out a case against the Respondents in this regard.

38. Having come to that conclusion, should the court consider the issue of damages either general or special damages? I think not. This is because having determined that the Petitioner has not made out a case for violation of rights and fundamental freedoms by the Respondents it will be an exercise in futility to attempt to consider the issue of general and special damages since it will not be based on any grounds. Even if I had to do so, the Petitioner did not call any evidence to prove damages whether general or special.

39. The Petitioner has sought compensation of KES 4,697,000/= for loss of goods and destruction of property. This being a claim of destroyed property and loss of goods, it is a special damage claim. It is the law that general damages should not only be pleaded but strictly proved. There are enough authorities on the issue and I need not labour the point. The Petitioner did not adduce any evidence that would have enabled the court to find in their favour with regard to the issue of loss and damage. Consequently this aspect fails too.

40. In the end, I find that the Petition lacks merit and is dismissed. As regards costs, the order I make is that each party do bear their own costs.

**Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> Day of September 2019.**

**E C MWITA**

**JUDGE**