



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 541 OF 2015

JEFFREY NDUNGI SILA.....PETITIONER

VERSUS

KENYA COPYRIGHT BOARD.....1ST RESPONDENT

MULTICHOICE KENYA LIMITED.....2ND RESPONDENT

FREDRICK SARAMBA.....3RD RESPONDENT

JUDGMENT

1. On or about 20th May 2014, Officers from *Kenya Copyright Board* and *Multichoice Kenya Limited*, the 1st and 2nd respondents herein, in the company of *Fredrick Saramba*, the 3rd respondent, visited the petitioner's, residential premises in South B Nairobi and conducted a search therein. They carted away items including electronics and personal documents.
2. The petitioner averred that the police officers and the 3rd respondent conducted what he said was an illegal search causing extensive damage to the house which the petitioner estimated to be Kshs1,963,284.41/-. It was stated that the petitioner was subsequently charged in criminal case No 742 of 2014 which is still pending before the Chief Magistrate's Court at Milimani.
3. The petitioner further averred that on 26th September 2014, police officers in the company of the 3rd respondent again visited his premises this time with a search warrant and demanded to conduct a search therein on allegations that the petitioner was infringing on the 2nd respondent's broadcast signal and distributing services to his own customers. They again carted away items and left without asking the petitioner to accompany them but no charges were preferred against the petitioner this time.
4. According to the petitioner, other officers again in the company of the 3rd respondent visited his premises on 18th March 2015 and although they had a search warrant, the officer named in the search warrant was not present and those present were not copyright inspectors. They were said to have taken away the petitioner's personal items including Laptops, Computers Cables, Hard Disk. Flash Disk, Mobile phone, a Sonny Camera Android TV Box and other assorted items.
5. The petitioner stated that he was charged in Court on 1st April 2015 with offences under the Copyright Act which proceedings are still pending. He stated that the searches were illegal and the police officers were accompanied by the 3rd respondent and that the searches were carried out ultra vires the Copy Right Act by criminals.
6. He averred that these actions violated his constitutional rights since he had neither infringed the Copyright Act nor had he committed any crime. He therefore sought the following reliefs:-

a) A declaration that the search of the petitioner's residence and the seizure and confiscation of his items on 20th May 2014 by the respondents without warrants or any Court order was a violation of the petitioner's fundamental right to equal protection and benefit of the law, human dignity, privacy and protection of right to property guaranteed by Articles 27(1) (2)28, 31 and 40 of the Constitution.

b) A declaration that the action by the officers of the 1st respondent and the 3rd respondent to confiscate the petitioner's private mobile phone on 31st March 2015 was illegal, unconstitutional, without any legal basis and a violation of the petitioner's

fundamental right to protection and benefit of the law, human dignity and privacy guaranteed by Articles 27, 28 and 31 of the constitution.

c) A declaration that the entry, search and other acts done by the 3rd respondent at the petitioner's premises on 20th May 2014, 26th September 2014 and 31st March 2015 were illegal, unconstitutional and a violation of the petitioner's right to privacy guaranteed by Article 31 of the constitution as he was not authorized by any search warrant or court order to enter and conduct a search on the petitioner's premises.

d) A declaration that the search warrants issued in the two instances herein viz on 19th September 2-014 and 18th march 2015 were unconstitutional and lacked any legal justification as the information by the deponents of the supporting affidavits to the applications for search warrants was devoid of sufficient material to afford reasonable suspicion of commission of any offence but were general and/or sweeping allegations touching on alleged infringement of copyright works.

e) A declaration that 1st respondent's officers acted unlawfully and illegally in confiscating the petitioner's items which cannot reasonably and/or possibly be classified as contrivances or goods reasonably suspected to be infringing on copyright.

f) A declaration that by manhandling the petitioner in the course of conducting a search within his premises, the respondents infringed on the petitioner's human dignity and the right not to be subjected to psychological torture as guaranteed by Articles 28 and 29 of the constitution.

g) An order of mandatory injunction be issued compelling the respondents to return to the petitioner all his confiscated items which do not form part of the exhibits to be tendered in evidence in Nairobi chief magistrate's Criminal Cases No 742 of 2014 and 600 of 2015 against the petitioner.

h) An order of general, exemplary and/ or punitive damages against the respondents.

i) Costs of the petition.

j) Special damages in the sum of Ksh1,963,283.41/-.

k) Interest on all monetary awards.

l) Any other or further relief that the court may deem just and fit to grant.

1st Respondent's Response

7. The 1st respondent filed grounds of opposition dated 22nd December 2015 and filed on 24th December 2015 and a replying affidavit by **Ephraim Ndiritu** a copy right inspector with the 1st respondent sworn on the same day 22nd December 2015.

8. In its Grounds of objection, the 1st respondent stated that it has mandate to administer all matters of copyright and related rights in Kenya and that under Article 40(5) of the Constitution, the state through organs such as the 1st respondent, has mandate to support and protect intellectual property of the people of Kenya, and that to that extent a right can be limited if it prejudices enjoyment of rights by others.

9. The 1st respondent contended that under section 40 of the Copyright Act, a copyright inspector is allowed to enter premises for purposes of ascertaining whether there is or has been on or in connection with such premises any contravention of the Act. It was also contended that sections 118 and 118A of the Criminal Procedure Code allow a Magistrate's Court to issue search warrants when there are sufficient reasons to believe that an offence may have been committed or is being committed in such premises. And further that section 40(2) of the Copyright Act allows a copyright inspector to seize and detain anything recovered in the premises which is suspected to be an infringing copy of any work.

10. In the replying affidavit, **Mr. Ephraim Ndiritu** deposed that the 1st respondent had no intention of raiding the petitioner's premises except for purpose of ascertaining if there was any contravention of the Copyright Act and that indeed they found such contraventions and the petitioner was charged in Criminal Case Nos. 742 of 2014 and 600 of 2015 after investigations revealed that the petitioner was illegally distributing DStv Broadcast Signals, an infringement of the 2nd respondent's copyright.

11. It was also deposed that search warrants were properly obtained and that the contrivances seized in the premises are to be produced as exhibits in the criminal cases which have unfortunately stalled because the petitioner has jumped bail. It was deposed that the petitioner had made an application before the magistrate's court for release of the items seized in his premises but they are yet to be concluded because the petitioner absconded.

2nd and 3rd Respondents' responses

12. The 2nd and 3rd respondents filed a replying affidavit by **Fredrick Saramba** the 3rd respondent, an anti-piracy manager with the 2nd respondent, sworn 14th July 2016 and filed in Court on 15th July 2016. He deposed that the petitioner was charged with infringing broadcasting signal contrary to the copyright Act, that the 2nd respondent provides subscriber management services for DStv a digital satellite pay television business.

13. He deposed that subscribers install signal reception equipment including decoders and smartcards which are personalized for a single subscriber. It was deposed that the petitioner was initially a DStv subscriber with the 2nd respondent with 11 accounts, that the 2nd respondent later became aware of a piracy problem and put in place counter measures and managed to identify the smart cards that were being used for the piracy were all registered in the petitioner's name and switched off those accounts on 23rd April 2014.

14. The 3rd respondent further deposed that other smart cards were again discovered on 29th April 2014 also registered in the petitioner's account and were also deactivated. This made the 3rd respondent start investigations. He deposed that a few days later the petitioner sent someone with a request for replacement of a smartcard which had been switched off on allegations that it had been misplaced, which request the 2nd respondent turned down.

15. According to the deponent, he identified the petitioner's residence as the place from where piracy was being conducted and reported the same to the 1st respondent. He therefore accompanied officers from the 1st respondent to the premises on 20th May 2014 and they confirmed that actually piracy was taking place and they recovered several items that were being used for that purpose. The 3rd respondent further deposed that they found out that the petitioner's server was forwarding control words to an Egyptian piracy server operation thus enabling Egyptian pirates' servers operation to provide DStv content in an encrypted format to subscribers connected to the Egyptian pirates

16. Following this discovery, the 1st respondent took action and charged the petitioner in court in criminal case No 742 of 2014. He further deposed that in March 2015, the Nigerian Copyright Commission conducted piracy raid in Nigeria and found the petitioner to be the main person supporting piracy operations within north and West Africa. According to the deponent this discovery prompted further investigations into the petitioners business with the assistance of the 1st respondent who obtained a search warrant for the subsequent search. He denied that there was violation of rights and fundamental freedoms of the petitioner. He also denied that there was damage to the petitioner's property or equipment.

Petitioner's Submissions

17. **Mr. Oduor**, learned counsel for the petitioner, submitted highlighting their written submissions that the search conducted in the petitioner's premises was unconstitutional. It was submitted that the 1st respondent's officers conducted searches at the behest of the 2nd respondent. According counsel, the first search was conducted on 20th April 2014 and the last on 31st March 2015, looking for equipment that was said to be used for piracy.

18. Learned counsel contended that the searches violated and infringed the petitioner's fundamental rights, that the searches were conducted by foreigners and criminals who took away the petitioner's personal effects, that the searches were conducted without authority from the court and that for that reason, they contravened Article 31 of the constitution.

1st Respondent's submissions

19. **Mr. Kaindo**, learned counsel to the 1st respondent, submitted referring to their grounds of opposition dated 3rd December 2015 and replying affidavit sworn on 22nd December 2015 by **Ephraim Ndiritu**, that the searches were conducted pursuant to section 40 of the Copyright Act which allows inspectors to enter premises and seize contrivances and goods without a warrant.

20. Learned counsel submitted that the 1st respondent obtained search warrants on 19th September 2014 and 18th March 2015 and that as a result of the searches conducted in the premises, the petitioner was charged with several criminal cases that are still pending in Court including criminal case No 742 of 2014, 600 of 2015 and 770 of 2016. He denied that the searches were conducted by foreigners or criminals.

2nd and 3rd Respondent's Submissions

21. **Mr. Owiti**, learned counsel for the 2nd and 3rd respondent, submitted highlighting their written submissions that the searches were conducted following a complaint by the 2nd respondent to the 1st respondent and was done in accordance with the law. Learned counsel contended that the petitioner was distributing DStv broadcast without the 2nd respondent's authority thereby committing acts of piracy.

22. According to learned counsel, the piracy was so serious that the Nigerian copyright Commission wrote to the 1st respondent complaining about the petitioner's conduct in cross border piracy as shown in its letter to the 1st respondent dated 11th March 2015. **Mr. Owiti** submitted that based on the well-founded complaints, the 2nd respondent filed a complaint with the 1st respondent after which the 1st respondent's officers accompanied by the 3rd respondent, visited the petitioner's premises to investigate the complaints.

23. Learned counsel submitted that one's constitutional rights can be limited where he has violated other people's rights which the petitioner had done. He contended that the petitioner cannot come to Court to seek protection when he himself is violating others' rights and at the same time running away from the course of justice. He also contended that there was no proof that the petitioner's property was damaged.

Determination

24. I have considered this petition, responses thereto, submissions by counsel for the parties and the authorities relied on. The petition raises two questions; first whether the petitioner's rights were violated and second, whether his property was damaged.

25. The petitioner's case is that his house was unlawfully searched and that in the cause of the searches, his properties were carted away and

in the process his house was damaged and it cost him a substantial amount of money to repair. According to the evidence on record, the petitioner was a customer of the 2nd respondent who had subscribed to Dstv for which he used to pay. Later there was suspicion that there was piracy going on and was reported to the 1st respondent whose mandate is fight piracy and protect holders of copyrights in the country. The 1st respondent sent Inspectors in the company of the 3rd respondent, an employee of the 2nd respondent, to investigate the case of piracy in the petitioner's premises.

26. From the **searches, they** were able to ascertain that there was indeed a case of piracy and took away some items from the petitioner premises as exhibits. They again obtained search warrants and visited the premises twice and in all the occasions, they were able to obtain more documents/material to confirm the ongoing piracy. The petitioner was arrested and charged in three criminal cases that are still pending before the Chief Magistrate's Court at **Milimani, Nairobi**.

27. The petitioner's case is that the respondents violated his rights by searching his premises and carting away his items and in the process damaged his house and property. The respondents on their part have contended that they followed the law and that in doing what they did, they were preventing crime.

28. It is strite law that a party who comes to Court on account of violation of rights and fundamental freedom, must plead with precision the Articles of the Constitution allegedly violated, the rights alleged to have been infringed, the manner of infringement and the jurisdictional basis. (*See Anarita Karimi Njeru v Republic* (No2) [1979]KLR 154).

29. The petitioner alleges that by entering his house and conducting search therein, the respondents violated his privacy contrary to Article 31 of the Constitution. Article 31 provides that **[31]. Every person has the right to privacy, which includes the right not to have- (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.** It is true that Article 31 of the Constitution protects privacy of the person from arbitrary search. This right is however not absolute. Article 24(1) of the Constitution limits rights in certain instances.

30. Article 24(1) with regard to limitation of rights provides that; (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; **(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;** and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. The petitioners right though protected is limitable. He can only enjoy it to the extent that the enjoyment does not jeopardize the right of others.

31. In the present case, there was an allegation that the petitioner was violating the 2nd respondent's copyright. The 1st respondent is established under section 3 of the Copyright Act to among other things **administer all matters of copyright and related rights in Kenya as provided for under the Act and to deal with ancillary matters connected with its functions under the same Act.** The Act defines "copyright" to mean copyright under the Act. In that case, therefore, the petitioner's right to privacy in so far as it was being raised to shield acts of violation of the 2nd respondent's right cannot be protected.

32. I have seen documents in this petition that support the respondents' position that they had reason to believe that the petitioner was violating other peoples' rights. Section 35(1) of the Act provides that **(1) Copyright shall be infringed by a person who, without the licence of the owner of the copyright—(a) does, or causes to be done, an act the doing of which is controlled by the copyright; or (b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.** For purposes of enforcing the Act, section 39 allows the 1st respondent to appoint copyright inspectors who may, under section 40 of the Act, at any reasonable time and on production of certificate of authority, enter any premises, ship, aircraft or vehicle for the purpose of ascertaining whether there is or has been, on or in connexion with such premises, ship, aircraft or vehicle any contravention of the Act.

33. Section 42 also allows a police officer to arrest, without a warrant, any person suspected, upon reasonable grounds, of having committed an offence under the Act. Further, it allows any officer of the Board who at the time is wearing a visible badge of office and authorized thereto in writing by the Board, to arrest, without warrant, any person, who, commits any such offence, and detain such person until the person is delivered into the custody of police to be dealt with according to law.

34. From the evidence on record, it is clear that the respondents' officers were on a mission to ascertain whether the petitioner was infringing the Act. The persons who were sent to the petitioner's house were authorized officers of the 1st respondent. Pursuant to a complaint filed with the 2nd respondent, they had reasonable grounds to believe that the house was being used to violate the Act and indeed found materials therein that confirmed their suspicion. On the basis of these facts and considering the applicable law, I am not satisfied that the petitioner has proved his claim that his rights were violated when the respondents conducted searches and seized goods from his house. Moreover, the petitioner did not prove that the people who conducted the searches were foreigners or criminals. Following the searches, the petitioner was charged in Court with copyright offences and the cases are still pending in Court. The first issue therefore, must fail.

35. The second issue is whether the petitioner's house was damaged and as a consequence the petitioner suffered loss and damage. The petitioner pleaded that his house was vandalized and items destroyed. This made him incur the amount tabulated in his amended petition that is; Kshs. 1,963,284.41 to repair the house which he claimed in the petition.

36. The petition was prosecuted by way of written submissions which the parties' counsel highlighted. The petitioner's counsel urged for grant of the petition while the respondents sought its dismissal. The petitioner also urged the Court to grant the amount claimed in the amended petition. I have gone through the amended petition, the supporting affidavit together with the annexures as well as submissions by counsel. The petitioner annexed to his affidavit in support of the amended petition some documents to support his position. He however did not testify or produced any other documents except the photocopies attached to the affidavit. One of the documents is a photocopy of what is called "**Final Report- Damage to Property**" prepared by **Proximate Adjustors Limited** dated 15th September 2015. It contains estimates for

the damage and cost of repairs for the petitioner's premises. These figures are clearly in the nature of special damages and this is also confirmed from the body of the petition and reliefs.

37. It is now settled law that a claim for special damages must not only be pleaded but should be specifically proved. Such a claim represents what the petitioner actually lost in the form of the amount used to repair the damaged premises and wants to be put back to the position he was before spending the money claimed. There are numerous decisions on this point but suffice to refer to these few. In the case of *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR the Court of Appeal stated that *it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.*

38. It is also a principle of law and legal requirement that a party, who desires the Court to award him special damages, must as a matter of law strictly prove them to the required standard. In this case, the petitioner did not adduce any evidence to prove the claim for special damages. There were no receipts to show that the money was expended at all. He merely pleaded and left it to the Court to decide. That is not the strict proof that is required. In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* (supra) the Court of Appeal observed regarding such a scenario;

“The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages.”

39. Further, in the case of *David Bagine v Martin Bundi* (CA No. (Nrb) 283 of 1996), the Court of Appeal, referring to the judgment by Lord Goddard CJ in *Bonhan Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177) observed-

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage., it is not enough to note down the particulars and so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

40. That is precisely the position I find in this petition where all the petitioner did was to note down what he considered to be the damages and asked the Court to grant them. He did not do anything or even try to prove them. Sections 107 and 108 of the *Evidence Act (Cap 80)* place the burden of proof on the party who wishes the court to give a decision in his favour. The petitioner had the burden of proving his case on a balance of probability but did not discharge this burden to warrant award of special or even general damages.

41. Having carefully considered the petition, the evidence and the law, I am not satisfied that the petitioner has proved either that his constitutional rights were violated or that he suffered any damage. As a result, this petition cannot succeed. In the circumstances, the Amended petition dated 6th February 2018 is declined and dismissed with costs.

Dated Signed and Delivered at Nairobi this 6th Day of April 2018

E C MWITA

JUDGE