



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 516 OF 2013**

**HALIMA NJIRAINY GICHUKI.....1<sup>ST</sup> PETITIONER**

**TUESDAY ONKEO GICHUKI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**SOUTH-END PROPERTIES LIMITED.....1<sup>ST</sup> RESPONDENT**

**OSINDE KABURU.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioners as well as the Respondents are not organs of the State. They are neither State officers nor public officers. This Petition is thus concerned with the horizontal application of and/or enforcement of the Bill of Rights.
2. The Petitioners claim that the Respondents have violated the Petitioners' rights and freedoms as guaranteed under Articles 28,29, 31, 39 and 40 of the Constitution and seek the Court's declaratory orders to like effect. The Petitioners also seek orders to restrain the Respondents from harassing, using threats to the Petitioners or otherwise interfering with the Petitioners quiet enjoyment of all that property known as Flat No. 27 Block 184 erected on a portion of LR. No. 209/10775 Nairobi ("subject property").
3. The Respondents have contested the Petition.

**Background Facts**

4. The Petitioners are adult Kenyans. They are husband and wife. The 1<sup>st</sup> Petitioner bought the subject property in July 1992. The Petitioners have a commonhold-lease tenure. The term-absolute is for 99 years from 1<sup>st</sup> April 1983 (less the last seven days). The term was granted by the 1<sup>st</sup> Respondent subject to the reservations, stipulations, covenants and agreements in the Lease dated 1<sup>st</sup> July 1992.
5. Under the Lease, the Petitioners are to pay a monthly service charge originally of Kshs. 200/= to the management entity incorporated by the 1<sup>st</sup> Respondent . The monthly service charge is for the purpose of settling and catering for all services including payment of land rent and rates. Other owners of apartments also pay an equivalent sum per month. The service charge has been reviewed over a period of time.

6. The 1<sup>st</sup> Respondent is a juristic person and the registered proprietor of all that land known as Land Reference No. 209/10775 ( “the estate”) whereon the subject property is erected.
7. The 2<sup>nd</sup> Respondent is a resident of the estate. His spouse, like the 1<sup>st</sup> Petitioner, also owns an apartment within the estate complex. He is the chairman of Estate’s Residents’ Association. He was elected in 2011.
8. The 2<sup>nd</sup> Respondent swore the Replying Affidavit filed herein on 6<sup>th</sup> January 2014.

### **Petitioners’ case**

9. The Petitioners’ case may be retrieved from the affidavits in support of the Petition.
10. It is basically that the Petitioners are the registered proprietors of the subject property and have been honouring the terms of the lease to the full and additionally paying the requisite rates to the county authorities. Yet, the 2<sup>nd</sup> Respondent acting on behalf of the 1<sup>st</sup> Respondent has numerously prevented the Petitioners, their family, servants and agents from using the main gate to the estate complex. The Petitioners also state that they have been denied access to their property.
11. The Petitioners further contend that the Respondents have made additional demands for service charge and attempts to have the Respondents to provide justification and/or information to the Petitioners for such demands have been unsuccessful. The Petitioners also accuse the 1<sup>st</sup> Respondent of failing to incorporate a management company.

### **Respondents’ case**

12. The Respondents deny that the Petitioners have been making the regular monthly service charge installments. They state that the Petitioners are in the arrears. The amount outstanding is stated to be over Kshs. 49,726/= which has continued to be outstanding despite explanations as well as demands. The Respondents further contend that the demands to pay rent and rates cannot be deemed to be a violation of constitutional rights.
13. The Respondents conclude by stating that the Petitioners are in breach of the terms of the Lease. The Respondents add that the Petitioners have failed to prove or demonstrate the breach of any constitutional rights.

### **Arguments & Issues**

14. The parties filed written submissions which were wholly adopted during the scheduled oral hearing.
15. The core issue is whether the Respondents have violated any of the Petitioners’ guaranteed constitutional rights. If so, what would be the appropriate relief?

### **Discussion and Determinations**

16. The role of the court is to determine if any of the Petitioners’ rights have been violated as alleged. It is for the Petitioners to demonstrate on a balance of probabilities that the rights or any of them have been violated: see **Anarita Karimi Njeri -v- R [1979] KLR 154** and also **Matiba –v- Attorney General [1990] KLR 666**.

The court must however refrain from trying to determine purely contractual disputes or disagreements arising directly from the private relationship between the parties unless the dispute indeed takes a constitutional trajectory.

#### *Violation of right to dignity*

17. Article 28 of the Constitution recognizes and guarantees the right to human dignity. The Article provides as follows: “*Every person has inherent dignity and the right to have that dignity respected*”. The Petitioners contend that by denying them access to their property or to engage a mechanic to repair their vehicles within the estate, the Respondents subjected them to inhuman

and degrading treatment and violation of their right to dignity contrary to Article 28. The Petitioners also contend that their right to freedom and security of person under Article 29 (a) has also been curtailed.

18. The Respondents deny that there has been tendered any evidence to substantiate the claims of violation. Further the Respondents also state that contractual stipulations under the Lease prohibit motor vehicle repairs within the estate.
19. The right to dignity has been described as the most important right only second to the right to life. In **S –v- Makwanyane [1995] 3 SA 391** where Chaskalson P stated as follows:

***“The rights to life and dignity are the most important of all human rights and .....of all other personal rights in the Bill of Rights”.***

20. The right to dignity is basically the cornerstone of the Bill of Rights. It assists in the enjoyment of all the other rights. It is at the core of the other rights. For example the right not to be tortured or be punished in a cruel, inhuman and degrading manner or even to be unlawfully detained or imprisoned, are supplemented by or supplement the right to human dignity. It is apparent that the other rights ought to be taken into account together with any other relevant factors to determine whether the right to dignity has been violated.
21. In the instant case, the Petitioners state that denial of access to their property as well as freedom to have a third party enter the property and repair the Petitioners’ automobile amounts to a violation of their right to dignity and to freedom of person. The Respondents contend that there is no evidence to prove such violation as alleged and further that, in any event, there is justification as the Petitioners agreed to the circumstances.
22. I must first point out that there is no evidence before me that the Petitioners were arbitrarily denied access to their property. Secondly, I must also point out that the mere fact of being inconvenienced by another party is itself not a violation of any right unless the inconvenience is arbitrary and exemplary.
23. The Respondents have stated that there is no evidence that the Petitioners were arbitrarily denied access to their property. I tend to agree. There is indeed no evidence of such denial. In these respects, consequently, the Petitioners have not shown that their right to dignity has been violated.
24. It was also the Petitioners’ contention that in limiting the Petitioners’ freedom and security of person and in denying the Petitioners’ agent or mechanic access to repair the Petitioner’s automobile, the Respondents violated the Petitioners’ dignity. The Respondents’ reply was that under the by-laws adopted by the members of the estate including the 1<sup>st</sup> Petitioner, repair of motor vehicles within the estate was outlawed.
25. Two factors stand out in the contractual relationship between the Petitioners and the Respondents. First, the tenure of the Petitioners’ property is not only a lease but what I may call a common-hold. The 1<sup>st</sup> Petitioner is the registered owner of the subject property. The designated user of the subject property is residential. It is erected on LR. No. 209/10775. There are other residential flats. There are other owners. Together with the other owners, the 1<sup>st</sup> Petitioner jointly owns various common areas. That creates the common hold tenure.
26. Secondly, the individual leases, have reservations, covenants and stipulations. The reservations or covenants and stipulations must be observed by all the parties to the Lease.
27. In the exercise and enjoyment of their constitutional rights the Petitioners, in my view, must also appreciate and ensure that the rights and fundamental freedoms of others are observed. The other owners of the residential flats within the estate are as much entitled to enjoy the use of the common areas or common hold areas, as the Petitioners. I am not convinced that the common areas could be used as garages or repair areas where persons who are not owners of any of the residential units could come and undertake their business. Such common areas are ordinarily used as parking bays and no more. I would consequently agree with the Respondents when they state that the by-laws, which have been annexed to the Replying Affidavit of the 2<sup>nd</sup> Respondent, prohibit such user. In these respects also, the Lease between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent which limits the user of the common areas is instructive in so far as it prohibits any user which may be deemed a nuisance or in contravention of any law.
28. I am satisfied that the Petitioners have not demonstrated to the required standards that their right guaranteed under Article 28 (as to dignity of person) has been violated.

*Violation of right to privacy*

29. The Petitioners also protest that their rights under Article 31 have been abused. The right to privacy, which is not absolute, is guaranteed by the Constitution under Article 31 in the following terms.

**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 communication infringed”.**

30. The Petitioners submitted that the Respondents have infringed their right to privacy by influencing the Petitioners’ domestic workers to give to the Respondents private information touching on the Petitioners’ family.

31. Both the Petitioners’ pleadings as well as submissions were lacking in material particulars as far as the alleged violation of the right to privacy is concerned. The specific nature of the invasion or the information allegedly retrieved from the Petitioners’ domestic workers is lacking. Neither have the Petitioners indicated nor identified the particular domestic worker(s) who could have published any private information touching and concerning the Petitioners’ family.

32. In the absence of such particulars, even in the case of horizontal application of the Bill of rights as in the instant case, it would not be possible to determine whether the Respondents’ conduct, if any, has infringed upon the Petitioners’ right to informational privacy which restricts the use of and disclosure of private as well as personal information.

33. I am unable to hold that the Respondents have infringed the Petitioners right to privacy.

*Right to information*

34. Article 35(1) (b) of the Constitution provides that every citizen has the right to access information held by another person and required for the exercise or protection of any fundamental right or freedom.

35. The right to access information from a private entity may only be exercised upon establishment of two factors which emerge from a closer and perceptive reading Article 35(1) (b) of the Constitution. To access information in private hands, a person must show that there is a need to know. The person must show that the information is required. Secondly, the person must also show that the information is required “*for the exercise or protection of any right or fundamental freedom*”.

36. A third factor also emerges when one reads the case of **Nairobi Law Monthly Company Ltd –v- Kenya Electricity Generating Company & 2 others [2013]eKLR**. The case stands for the proposition that a request or demand has to be shown to have been made for such information from the holder. So stated Ngugi J in the **Nairobi Law Monthly Company Ltd –v- Kenya Electricity Generating Company & 2 others [2013]eKLR**

**“.....what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.”**

37. The Petitioners herein received a demand from the Respondents for the payment of Kshs. 49,726/=. That was on 26 April 2011. Then the Petitioners through their Advocate on 2 May 2012 demanded for particulars of the amount. There does not exist any specific reply from the Respondents. The Replying Affidavit has however sought to explain that the said amount of Kshs.

- 49,726/= is the equivalent of the arrears of service charge due from the Petitioners. The Respondents have also exhibited various copies of letters dating back to the year 2000 to illustrate that the Petitioners have been in arrears.
38. The Petitioners have satisfied one of the requirements for the exercise of or entitlement to the right to information under Article 35(1) of the Constitution. The Petitioners have established that a demand or request for information was made. The Petitioners do not however show why and how the information sought, being particulars of the amount of Kshs. 49,726/=:, would help in the exercise of any other right or was necessary for the better exercise of the other rights and fundamental freedoms. Besides, it is apparent from the various correspondence exchanged between the 1<sup>st</sup> Petitioner and 1<sup>st</sup> Respondent between the period 2000 up till February 2012 that the Petitioners were always aware why the amounts were being demanded from them.
39. I am unable to find that the Petitioners right of access to information has been violated in the circumstances of this Petition.

#### *Violation of freedom of movement*

40. Every person has the right to freedom of movement. The freedom of movement is protected under Article 39.
41. The Petitioner presented no evidence on how this freedom has been curtailed. It would be unnecessary for me to attempt to discern whether, the Petitioners' right to move about freely has been violated or is under a threat of violation.

#### *Violation of right to property*

42. It was the Petitioners' case and argument that by the Respondents threatening to send auctioneers to the Petitioners' premises with a view to collecting money whose basis the Petitioners claim was unknown amounts to a violation of the Petitioners' right to property guaranteed under Article 40 of the Constitution.
43. It cannot be disputed that the 1<sup>st</sup> Respondent is enjoined to collect service charge and any other management fees payable by the Petitioners as well as other flat owners. The lease executed between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent dated 1<sup>st</sup> July 1992 states as much. The Petitioner was apparently in default, if the unchallenged correspondence is anything to go by.
44. When however such amount is genuinely due, it becomes a civil debt. It may and should only be recovered by an action-in-debt. There is need, in such a case for due process. The Petitioners may indeed dispute the basis of the amount as well as the aggregate quantum.
45. The effect of sending an auctioneer to the Petitioners' premises without obtaining appropriate court orders would however be to put in motion an arbitrary process of recovery. It would also be an arbitrary interference with the property of an individual. It would likewise amount to interference and a violation of the right to privacy under Article 31(b) of the Constitution as the auctioneers would be seizing the Petitioners' possessions without the due process having been followed.

#### **Conclusion and disposal**

46. With regard to the identified issue as to whether any of the Petitioners' rights and freedoms under the Constitution has been violated, I return the verdict that none has been violated. The threat to send auctioneers to seize the Petitioners' property in satisfaction of an alleged civil debt is also too bear and remote to invite any interference by the court now in the form of any injunctive or prohibitory orders.
47. Prudent counsel would dictate that the Respondents follow the due and formal process of recovery, rather than engage in the unwarranted alarmist threats. The Respondents are at liberty to pursue any civil action having made the appropriate demand.
48. In light of my findings, the Petition fails and is dismissed.
49. The Respondents' success in resisting the Petition dictate that they be awarded costs. I award the Respondents costs. The Petitioners will accordingly meet the costs of the Petition.
50. Decree, accordingly.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day February, 2016**

***J.L.ONGUTO***

**JUDGE**