



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

PETITION NO.240 OF 2015

BETWEEN

BETHWEL OMONDI OKAL.....PETITIONER

AND

MANAGING DIRECTOR KPLC & COMPANY.....RESPONDENT

JUDGMENT

1. The Petitioner is a resident of Kabuoro sub-location, Central Kamagambo Location, Rongo District, Migori County and owns a house on L.R. No.Kamagambo/Kabuoro/4680 which he states that he bought in August 2005.

2. His complaint in the Petition dated 2nd June 2015 is that in the month of March 2015, the Respondent's servants and/agents trespassed onto the above parcel of land and without his consent cut trees, bananas and other plants in the guise of exercising the rights conferred by the **Wayleaves Act Cap 292** and thereby caused the Petitioner loss and damage.

3. He therefore prays for the following orders:

“a) An order for compensatory damages occasioned due to trespass and destruction of trees resulting in indignity, inhuman or degrading condition and subjecting his family to psychological and physical torture.

b) An order for structured injunction prescribing appropriate restorative measure so as to vindicate the rule of law to address punitive, aggravated and exemplary damages inflicted upon the family and himself due to recklessness and malice and as a deterrence so as to safeguard and protect the societal values of human rights, human dignity, privacy and non-discrimination.

c) That the costs of and incidental to this Petition be awarded to the Petitioner against the Respondent including interests thereto.

d) That this Honourable Court be pleased to grant such further order or orders.”

Petitioner's Case

4. In his Petition, supporting Affidavit sworn on 2nd June 2015 Supplementary Affidavit sworn on 21st July 2015, Submissions filed on 8th January 2016 and Rejoinder Submissions filed on 29th February 2016, the Petitioner has stated that whereas it was provision of electricity services to his neighbour that triggered the Respondent's actions as aforesaid, his right to a clean environment, and privacy were thereby violated. Further, that the said actions exposed his family to indignity and discrimination. In addition, that his family has been exposed to degrading and inhuman circumstances and have suffered physical and psychological threats to their lives as a result of the mutilation of their serene and leafy environment.

5. In his submissions, and of relevance to the issue at hand, the Petitioner stated that the Respondent is obligated to observe human rights as enshrined in the Constitution 2010 and specifically;

- i. **Article 26 (right to life)**
- ii. **Article 28 (human dignity)**
- iii. **Article 29 (freedom and security of the person)**
- iv. **Article 31 (privacy)**
- v. **Article 40 (property)**
- vi. **Article 42 (clean and healthy environment)**
- vii. **Article 47 (right to fair administrative action)**

6. Further, invoking the principle of precautionary policy he relied on the decision in **Ms. Shehla Zia and Others v Wapda PLD 1994 Supreme Court 693** to argue that the Respondent, in enforcing the **Wayleaves Act**, had to be cautious about the effect of its actions on the environment and the livelihoods of people living under or near electricity lines.

7. Furthermore, relying on the decision in **H.C.Misc.Civil Application No.1298 of 2004** (*parties not stated*), he argued that one of the rules of natural justice is that a decision maker ought to give an affected person an opportunity to reply or rebut any complaints made against such a person.

8. He added that following **R v Whalen (1974) 17 CCC 217**, "**justice is not confined to the acts of law, Parliament or Legislatures ... justice is alive and allowed to live within the community.**" The Petitioner also quoted from De Smith and Braizer in **Constitutional and Administrative Law, 6th Edition at page 557** to make the point that rules of natural justice are applicable in all instances where a decision affects the interests of another person and that one of the rules of natural justice is that a decision-maker ought to act without bias.

9. Regarding the right to fair administrative action, the Petitioner submitted that the Respondent was required by **Section 46** of the **Energy Act** as read with **Section 4** of the **Wayleave Act** to give notice of intention to carry out electricity supply works but no such notice was issued to him or to his wife. In that regard, he has denied that his wife ever signed any consent documents as pleaded by the Respondent.

10. Relying on the decision of Majanja J in **H. C Petition No. 325 of 2012** (*no parties given*), he made the point that all statutory provisions must be enforced and read with the rich values and principles enshrined in the Constitution. Further, that "**notice is a key component of due process.**" He added that a similar finding was made in **H.C Misc. Application No.583 of 2006** (*no parties given*).

11. While arguing that the aforesaid actions of the Respondent were actuated by *inter-alia* malice, impunity and irresponsible considerations, the Petitioner submitted that by producing a fraudulent Wayleave document before this Court, the Respondent was out to frustrate and debar the cause of justice. Following the decision of Ibrahim J (as he then was) in **R v Nema and 2 Others ex-parte Greenhill Investment Ltd**, he added that express violations of due process, principles of good governance and statutory provisions have the effect of violating fundamental rights and freedoms of the individual. On the same point he relied on the decision in **Petition No.352 of 2012** (*supra*) and **Msagha v Chief Justice & 7 Others** (*no other citation given*).

12. While invoking **Articles 10** and **232** of the **Constitution** i.e. national values and principles, and principles of public service, the Petitioner submitted that read together with **Articles 2(5)** and **20(1)** of the **Constitution**, the Respondent is obligated to uphold the basic rights and fundamental freedoms in **Articles 26, 28, 29, 31, 40, 42** and **47** of the **Constitution** and by failing to do so, the Respondent ought to be held culpable and should be ordered to compensate the Petitioner under **Article 23** of the **Constitution**. In making that point, the Petition submitted that by *“showing complicity in environmental degradation, which has the effect of destroying [his] home by exposing the home to power leakage and ... right to property taken away including right to life and health as in the exposure to continuous radiation from the electric field may lead to terminal illness and death,”* the Respondent ought to be compelled to compensate him.

13. Relying on **H. C. Misc. Civil application No.1298 of 2004 (supra)**, he therefore submitted that there ought to be a remedy whenever the law is flouted, irrespective of the position or status of a respondent. That the same principle was restated in the **LSK Journal 9(2), 2013** at paragraphs 2.0 and 3.1 and **C.O.M. v The Standard Group & Anor Petition No.192 of 2011** by this Court.

14. On alleged dispossession of property, the Petitioner relied on the decision of Nyamu J. (as he then was) in **Misc. Application No.587 of 2006, KLR 2015** (*that is the citation he gave*) to make the point that no property can be taken away without due process. The same finding was made in **HCCC No.438 of 2004, Parkview Shopping Acade Ltd v Charles M. Kang’ethe & 2 Others, Kenya Law Review Vol. 1; 19, 2007 at page 26** where it was also added that full and fair compensation must be made where a registered owner of property is deprived of his property.

15. Reverting to his submissions on the right to life and a clean and healthy environment, the Petitioner relied on **P.K. Waweru v AG & Others (2006) 1 KLR 444; [207]2 KLR** to make the point that life was more than soul and body; and that the right to life includes a clean and healthy environment. That the same finding was made in **Nabori & 9 Others v AG [200] 2 KLR 442**.

16. In concluding his submissions, the Petitioner, relying on **Esso Standard Ltd v Semu Amanu Opio SCCA 343 of 1987** submitted that he was entitled to Kshs.10 Million as compensatory damages, Kshs.5 Million as pecuniary damages and Kshs.5 Million as exemplary damages plus a *“structural interdict which shall be accompanied with unequivocal statement of apology, interest and any other order the Court may deem appropriate.”*

Respondent’s Case

17. The Respondent in answer to the Petition filed a Replying Affidavit sworn on 9th July 2015 by Elsie Mworira, Legal Officer of the Kenya Power & Lighting Co. Ltd. (KPLC) Submissions and authorities were also filed on its behalf on 22nd January 2016.

18. Although it is the Managing Director KPLC that was sued, the response to the Petition was made in the name of the said corporation and in her Replying Affidavit aforesaid, Elsei Mworira deponed that from records received from KPLC offices in Bondo, the facts giving rise to the Petition are that one, Charles Oruko, proprietor of a parcel of land neighbouring the Petitioner’s land had applied for electric power connection to his property. It was necessary to lay supply cables and electric poles across the Petitioner’s property to meet the said Oruko’s request.

19. It was the Respondent’s case in that regard that it obtained a wayleave consent from the proprietor’s wife, one Jane Atieno Obila, and the consent necessitated the following actions:

- i. One tree had to be cut down within the Petitioner’s land.
- ii. A number of trees had to be trimmed as their branches may have interfered with the powerline.

20. It was the Respondent’s further case that it is its obligation to compensate a land owner for any damage occasioned to his property upon actions such as the above and that ordinarily a Crop Damage

Report (CDR) is prepared before such compensation. That at the time of the filing of this Petition, the Respondent was ***“in the process of undertaking the said CDR report and thereafter compensate the wayleave holder.”***

21. It was the Respondent’s further case that because the wayleave consent was irrevocable, the Petitioner is now estopped from disclaiming the representations made to the Respondent in that regard.

22. The Respondent added one other matter of fact; that the Petitioner’s wife applied for supply of electricity to the Petitioner’s land on 20th April 2015 but failed to pay the connection fee of Kshs.24,120.00. She was apparently later arrested and charged under the **Energy Act, 2006** for operating an unmetered electricity supply which had been illegally connected.

23. In submissions, Counsel for the Respondent stated that, firstly, there is no evidence that the wayleave consent was not properly obtained and that under **Section 110** of the **Evidence Act**, the burden of proving the contrary lay with the Petitioner.

24. Secondly, that following the principle laid down in **Anarita Karimi Njeru v R, Misc. Criminal Application No.4 of 1979** and followed in **NONDO v Governor, County Government of Garissa [2013] e KLR** and **Stephen Nyarangi Onsuma & Anor vs George Mogoha and 7 Others [2014] e KLR**, a party pleading violation of constitutional rights must at the very least present to Court the factual basis upon which the Court can make a determination whether or not there has been a violation and that the Petitioner had failed to do so.

25. Further, on the same point, while relying on the decision of the Court of Appeal in **Mumo Matemu vs Trusted Society of Human rights Alliance & 5 Others [2013] e KLR**, Counsel submitted that the Petitioner had failed to tender any material or evidence of the number of trees that were cut by the Respondent to justify the compensation sought. That he had also failed to produce evidence to indicate how close the power lines were to his house to justify any claim of breach of any of his rights as alleged the alleged; and there is no evidence of leakage of electric current that would be harmful by way of radiation to the Petitioner’s family.

26. Thirdly, that the Petitioner has failed to provide any basis or justification, either in law or judicial precedent, for the quantum of damages claimed in his submissions.

27. Lastly, on costs, the Respondent, invoking the decision in **Rai v Rai [2014] e KLR** submitted that since costs follow the event, the costs of the Petition should be paid by the Petitioner.

Determination

28. I have considered the pleadings and submissions filed by the Parties and the facts of the present dispute are that sometime in March 2015, the Respondent agreed to connect and supply electricity to the home of one, Charles Oruko, who was/is a neighbour to the Petitioner. To enable it to do so, it was obligated to seek a wayleave from the Petitioner and it is not denied that the Petitioner’s wife had authority to grant such a wayleave. What is contested however is whether in fact she consented to it. In any event, the Respondent entered the Petitioner’s land and in creating a path for the powerline had to cut down a tree or trees and also cut down branches of some trees. The number of trees cut is contested but it is agreed that the Respondent, as is the practise, has yet to prepare a Crop Damage Report (CDR) neither has the Petitioner undertaken an independent and professional assessment of the damage allegedly caused to his land.

29. In that context, I must firmly hold that from the outset, this Court has two conflicting statements as to the damage caused to the land and without an independent assessment thereof, it is very difficult to quantify the exact or at the very least, approximate damage to trees, branches etc on the Petitioner’s land.

30. What of the important question whether consent was given for the Respondent to enter the Petitioner’s land? The Petitioner has denied such a consent and in an unprocedural manner tendered copies of a letter

dated 9th March 2015 from Jane Atieno Obila (his wife) to the Secretary, Teacher's Service Commission, a cash deposit slip dated 2nd June 200 at the Kenya Commercial Bank Kisii, signed by the said wife, a payment slip at the Migori Teachers Sacco Society Ltd by the same wife dated 25th April 2014 and a loan application dated 12th January 2010 signed by her. A copy of her identity card was also supplied and as I gather, the intention was to show that the signature on the wayleave document dated 18th March 2015 did not belong to the Petitioner's wife.

31. Again on this question, it is not enough to produce a series of documents (*even if they were procedurally produced*) to show that in the Petitioner's view, the signature on the wayleave document did not belong to his wife. Neither the Petitioner nor this Court are experts in document examination which is on the preserve of a few. It would have been prudent to submit those documents to an examiner's eye and on the basis of a professional report, the Respondent could either produce an alternative report or challenge the one produced by the Petitioner. As issues stand now, it is impossible to deny, by use of the naked eye, that the signature on the wayleave agreement does not belong to the Petitioner's wife.

32. With the above background, in the Petition, the Petitioner claimed the following violations and alleged unlawful actions:

- i. Paragraph 5 – right to non-discrimination, dignity, freedom of expression and reputation.
- ii. Paragraph 6 – trespass and environmental damage.
- iii. Paragraph 7 – right to a clean environment, human dignity and privacy.
- iv. Paragraph 8 – trespass.
- v. Paragraph 7 (repeated but it should be paragraph 9) - same as paragraph 7 above.
- vi. Paragraph 8 (repeated but should be paragraph 10) – trespass, claim of release of carbon compounds and radiation.
- vii. Paragraph 9 (repeated but should be Paragraph 11) – loss of food and exposure to hunger.
- viii. Paragraphs 10, 11, 12, 13, 14 and 15 (should be paragraph 12, 13, 14, 15 and 16) - repetition of all the above but in addition:
 - a. Emotional distress and torture are alleged and;
 - b. Breach of right to fair administrative action.

33. In addressing the above issues, firstly what is the proof expected of an applicant making such claims? Secondly, has the Petitioner met the above standard of proof? Thirdly, is he entitled to the orders sought?

34. In the above regard it is now settled in Kenya that a person alleging violation of constitutional rights must meet the following criteria;

- i. He must show with a measure of particularity what specific right has been violated.
- ii. He must show how the right was violated and;
- iii. Therefore what injury has been caused to him.

35. The above criteria was laid out in **Anarita Karimi Njeru v R, Misc. Criminal Application No.4 of 1979** and **Mumo Matemu vs Trusted Society of Human rights Alliance & 5 Others [2013] e KLR**, and although there are legal scholars who have taken issue with the above test, our Courts have been steadfast in upholding their but tailoring them to the circumstances obtaining in each case.

36. In applying the above test, shorn of all the verbosity of submissions, the Petitioner's claim is simply that an unclear number of trees were cut on his land and that he has suffered all the violations that I have enumerated above. I have stated however that he failed to bring an expert's report or other cogent evidence indicative of and as a proof of that fact. The Respondent for example has stated that only one tree was cut and that a number of other trees were trimmed on their branches to create unhindered access

for the power lines.

37. The Petitioner in any event tendered in evidence blurred photographs of felled trees and banana plants but that is insufficient evidence in a contested matter such as this one. Further, in his letter dated 8th April 2015 to the Director, Environmental Management Office, Migori he stated as follows:

“The resultant effects of the invasion is ruins of trees stumps, heaps of threes felled down carelessly and the banana plants due to loss of windbreak“ (sic).

38. What are my impressions and what am I to make of the above statement? Is it that the Respondent cut down some trees and created space for the wind to bring down others or that in fact the trees and banana plants were cut down by the Respondent’s agents? In the Petition and Submissions, the latter would seem to be the claim made but the latter theory points me to a different direction.

39. In meeting the criteria set out above therefore, I am not satisfied that the facts as placed before me are sufficient to show that there was such gross action on the part of the Respondent as to lead to an adverse finding or that the bare statements with no proof whatsoever made about the alleged adverse effects of the cutting down of the trees were a violation of the following rights.

- i. Right to life.
- ii. Freedom and security of the person and;
- iii. Human dignity.

40. Allegations of effects of radiation and carbon compounds were for example made in general terms with no evidence to back them up. Similarly, allegations that the Petitioner’s family was subjected to hunger and torture were no basis at all for a claim of violation of all the rights set out above. But suppose in fact there were? What rights were thereby violated?

41. I have stated elsewhere above that the **right to life (Article 26) human dignity (Article 28), freedom and security of the person (Article 29), privacy (Article 31), property (Article 40), clean and healthy environment (Article 42) and fair administrative action (Article 47)** were allegedly violated and the Petitioner has so pleaded.

42. In that regard, claims relating to violation of the right to privacy, property and a clean and healthy environment are however tied to the question whether the Respondent’s agents had his wife’s consent (and by extension, his consent as he had expressly delegated the matter to her) when they entered his land. I reiterate in that regard that I am unable to fault the way leave consent document produced by the Respondent and the presumption is that such consent was given. If not, why is there no affidavit or other evidence from his wife denying grant of such consent including the fact that her signature and identity card number are on the said document?

43. In a nutshell, there is no evidential basis for me to interrogate in depth whether the above rights have been violated and I must answer the first two questions that I sought to answer in the negative.

44. Is the Petitioner therefore entitled to the orders sought? He has sought ***“compensatory damages due to trespass and destruction of trees resulting in indignity, inhuman or degrading condition and subjecting [his] family to psychological and physical torture.”*** I have shown that such a prayer cannot be granted for the reason that there is no evidence of such losses and/or resultant violation of constitutional rights.

45. The other prayer was for ***“an order for structured injunction prescribing appropriate restorative measure so as to vindicate the rule of law, to address punitive, aggravated and exemplary damages inflicted upon the family and himself due to recklessness and malice and as a deterrence so as to safeguard and protect the societal values of human rights, human dignity, privacy and non-***

discrimination.” It is obvious that the said prayer cannot be granted and the reasons thereof are clear from my findings above.

46. Regarding costs, ordinarily they follow the event but one consideration must be taken in favour of the Petitioner. At paragraphs 11 and 12 of the Replying Affidavit of Elsie Mworira, it is deponed as follows:

“11. That I am also aware that the company (KPLC) compensates for any damage most specifically on felled trees and that before any compensation is undertaken, a crop damage report (CDR) which provides an outline of the damage caused has to be prepared.

12. That further, I am also aware that in view of the foregoing, the company is in the process of undertaking the said CDR report and thereafter compensate the wayleave holder.”

47. I have in that context held that neither the Petitioner nor the Respondent brought forth any proper evidence as to the damage caused during the laying of the electric power lines. It was the Petitioner who was however obligated by dint of **Section 107(2)** of the **Evidence Act** to prove his claim. That **Section** provides thus:

“(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.”

48. He failed to abide by the above edict hence my findings elsewhere above but the Respondent cannot escape sanction. Had it produced the CDR, this Court would have weighed it against the Petitioner’s claims but for a year plus, no such report exists. I will make necessary orders shortly in addressing that issue but on costs, it is best that in the circumstances, each party bears its own costs.

Conclusion

49. The Petitioner has put up a spirited fight to seek Kshs.20 Million as compensation plus costs for alleged violation of his fundamental rights and freedoms. I have shown that his claim is however caught up in an evidential quagmire and cannot be sustained. I have also found that there is an admission that had the CDR been prepared, this Petition may not have been necessary. The Petitioner, although a loser in the Petition is nonetheless entitled to orders under **Article 23(3)** of the **Constitution** in pursuance of that admission.

50. I would lastly like to commend the Petitioner, a layman, for his efforts in research and depth of his Submissions and the fact that the Petition will be dismissed is in no measure because of lack of enthusiasm or seriousness on his part. The facts and the law simply do not necessitate its success.

Disposition

51. For the above reasons, the following orders are made pursuant to **Article 23(3)** of the **Constitution** which grants this Court the mandate to make any appropriate orders:

1. The Respondent shall within 45 days conduct an assessment of any damage occasioned on the Petitioner’s land, L.R. No.Kamagambo/Kabuoro/4680 and prepare a Crop Damage Report (CDR) within the same period. It shall thereafter proceed and pay such compensation as is lawful, fair, reasonable and appropriate.

2. All other prayers in this Petition stand dismissed.

3. Each Party shall bear its own costs.

52.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioner present

Mr. Malonza for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE