



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 501 OF 2013

BETWEEN

DR. KIRIINYA M. MWENDIA.....PETITIONER

AND

RUNDA WATER LIMITED 1ST RESPONDENT

RUNDA ASSOCIATION.....2ND RESPONDENT

JUDGMENT

1. The petitioner is the registered proprietor of two properties **LR No. 7785/334** and **Nairobi/Block 99/10** situated in the up-market suburb known as Runda Estate within Nairobi. He resides on **NAIROBI/BLOCK 99/10**.
2. The 2nd respondent is an association of the residents of Runda Estate and it is involved, inter alia, in providing and maintaining common services in the area. It owns and operates the 1st respondent company, Runda Water, which supplies water to the area residents. The petitioner avers that he is not a member of Runda Association. He also states that he is supplied water by the Nairobi City Water and Sewerage Company Limited (“NCWSC”)
3. In 2011, he decided to commence development on **LR No. 7785/334** and in that respect he applied for a change of user and planning permission in order to construct a Health and Fitness centre and staff housing. By a letter dated 18th July 2011, the City Council of Nairobi approved the plans. The permit was renewed on 18th July 2013.
4. The petitioner avers that NCWSC was providing him with water until on or about 6th November 2011 when Runda Water stopped the water connection being supervised by NCWSC. On 1st December 2010, the Runda Police destroyed the petitioner’s water pipes and construction material and took equipment.
5. The petitioner complains about the pricing and general management of water services by Runda Water. He avers the water supplied is more expensive and of lower quality than that provided by NCWSC. He contends that he is entitled to be supplied with water from a company of his choice and the acts of interference by the respondents amount to a violation of the **Consumer**

Protection Act and **Article 46** of the Constitution which protect consumer rights.

6. The petitioner avers that the 2nd respondent has come up with rules which interfere with his construction and operations. Although he is not a member of Runda Association, he states that the rules are imposed on him and are notified through notices and posters within Runda Estate and its environs. The petitioner avers that the respondent proscriptions are draconian. These regulations include the following;

- No construction on weekends from Saturday 1pm to Monday 7am and public holidays.
- No trucks on weekends from Saturday 1pm to Monday 7am and public holidays.
- No vehicles over 7 tonnes, no matatus, no boda boda allowed.
- All trucks must have a gate pass.
- No loitering, dumping or burning of rubbish.
- Maximum speed limit of 30kph.

7. The petitioner complains that the respondents have placed barriers throughout Runda Estate making free access to vehicles impossible. He decries the fact that vehicles delivering construction material to his property have been detained and a penalty demanded by the respondents before the vehicle is released. As a result of the impediments imposed by the respondents, the petitioner avers that his construction has been delayed. Mr Njomo, counsel for the petitioner, urged that the erection of barriers and obstruction of the petitioner's right of way contravene **sections 49 and 53** of the **Kenya Roads Act** and **section 15** of the **Public Roads and Roads of Access Act**.

8. On the whole, the petitioner's case is that his construction work has been inconvenienced, he has suffered loss and damage and his right to use and enjoy his property protected under **Article 40** has been violated by the respondents. The petitioner maintains that he should not be compelled to join Runda Association whose membership is entirely voluntary and to coerce him to join the association either directly or indirectly is a violation of his freedom of association guaranteed under **Article 36** of the Constitution. Mr Njomo supported the petitioner's case by written submissions. He urged the court to allow the petition.

9. When the matter came up for hearing on 17th December 2013, I directed the parties to explore amicable settlement in light of the court's obligation under **Article 259(2)(c)** of the Constitution which mandates the court to promote alternative dispute resolution. I also issued interim relief on the following terms;

1. *The petitioner shall have reasonable access at reasonable times to his residence/suit property for construction purposes through authorised access points to the Estate.*
2. *The petitioner shall pay to the Estate the requisite monthly security charges.*

10. As the parties did not agree on a settlement of the matter, it proceeded for hearing. Mr Njomo urged the court to be guided by the reliefs the court granted in a related matter **Prof. Wafula Masai v Runda Water Limited, Nairobi Petition No. 492 of 2013(Unreported)** where I made the following orders in relation to a dispute between a resident constructing on his property and Runda Water.

- ii. *The petitioner shall be at liberty to apply and the respondent shall consider the petitioner's application for water connection.*
- iii. *The petitioner as a member of the Runda Association shall only be subject to and charged any*

levies applicable to all the members of the Association.

- iv. *Subject to the petitioner following the rules of Runda Association, the respondent is restrained from interfering with the petitioner's construction on LR No. 7785/491.*
- v. *Either party shall have liberty to apply for further and other orders.*

- 11. Mr Njomo however submitted that in addition to resolving the petitioner's grievances the court should address the constitutional issues raised as they are matters of public interest.
- 12. Mr Bwire, the respondents' counsel, accepted the decision in **Prof. Wafula Masai v Runda Water Limited (Supra)** as resolving the petitioner's case. He however contended that the provision of water services was governed by the **Water Act** as Runda Water was a licenced water service provider with statutory obligations. He rejected any suggestion that there was a breach of **Article 46** of the Constitution.
- 13. I agree with the parties that the matter may be resolved on the same terms as **Prof. Masai v Runda Water Limited (Supra)**. However, it is important to address the issues raised by the petitioner in order to put to rest his grievances but before I proceed to do so, I think it is proper to settle the issue of the petitioner right to construct on his premises as I think this is the basis of the dispute between the parties.
- 14. Cleopas Agingu, the commercial manager of Runda Water, in his deposition sworn on 11th November 2013 states as follows;

[4] That notwithstanding that the applicant had applied for a change of user from the Nairobi City Council the said was issued 'subject to compliance with the approved zoning policy' the proposed development was not approved by the 2nd respondent or at the minimum notified to them.

[5] That as is clearly shown The advertisement was made in the year 2002 whereas the notification of approval for development permission suspiciously made a whole nine years later on 23.06.2011 contrary to section 33(2) and 34 of the Physical Planning Act disclosing mischief for which the 2nd respondent has resisted.

- 15. The respondents resisted the application for change of user through two letters; the first is dated 9th October 2008 and was addressed to the Town Clerk and the other one dated 4th May 2011 addressed to the Director of City Planning. It is not clear what further steps were taken by the Association to oppose the change of user or construction permission. As no step was taken in that regard, the development permission granted by City Council to the petitioner remains valid until it is set aside according to the law. I would no better than repeat what I stated in **Prof. Masai v Runda Water Limited (Supra)**, "[12] *In this case the petitioner had applied for and obtained the necessary approvals from the planning authority which is the Nairobi City Council. It was unfair and unreasonable to refuse the approval for connection on grounds set out in paragraph 4(ii) of the email dated 5th April 2013 on the basis of mere suspicion. The City Council approval remains valid and has not been challenged. If the respondent or the Association wanted to challenge the approval by City Council as being inconsistent with zoning regulation, nothing would have been easier than to lodge judicial review proceedings to quash the decision or appeal the decision through the mechanisms provided under the **Physical Planning Act.***" I find and hold that absent a specific and direct challenge, in a manner contemplated by the law, the respondents cannot question or cast doubt on the permission granted by the Nairobi City Council as a basis for refusal to deal with or frustrate the petitioner's intention to develop his property.

16. I now turn to the issue of provision of water. Delivery of water services is governed by the **Water Act, 2002**. It is not disputed that Runda Water was appointed a Water Undertaker or Water Service Provider (“WSP”) by **Gazette Notice No. 456** dated 6th February 1975 to supply water exclusively to the area covered by LR No. 7785 and Nairobi Block 112. The Water Services Regulatory Board (“WASREB”), the water services regulator under the **Water Act, 2002**, approved the service provision agreement for Runda Water on 20th January 2010 for a period of 5 years within the area of its exclusive jurisdiction.
17. According to the deposition of Cleopas Agingu, the issue of supply of water to residents of Runda Estate by NCWSC was raised and was the subject of correspondence to the Athi Water Services Board (“AWSB”). AWSB is established under **section 51** of the **Water Act, 2002** to oversee the efficient and economic provision of water by WSP’s within the region. The matter was then referred to WASREB for resolution and by a letter dated 27th March 2012 AWSB was informed that it was in breach of its licence by allowing NCWSC to intrude into areas supplied by Runda Water. The letter stated as follows;

Having received and perused the map provided, the licensee is in breach of the licence conditions:

- a. *By allowing the Nairobi WSP to encroach on the Runda WSP.*
- b. *Nairobi WSP does not have the legal power and authority as per section 55 of the Act to provide water in the area provided and thus the licensee is sanctioning an illegality.*
- c. *There are huge swathes of Nairobi County that the Nairobi WSP is not serving and it is an inefficient and misdirection of public resources for the WSP to divert water and venture into Runda’s exclusive area where there is already service, to serve 9 households.*

As a result of the finding, AWSB was ordered, “*Direct and enforce the direction that Nairobi WSP ceases to encroach on the demarcated area of another WSP.*”

18. A consequence of the direction by WASREB to AWSB was that by a letter dated 4th April 2012 NCWSC was directed to cease supplying water to individual customers within the area covered by Runda Water. It is for this reason that the petitioner was disconnected from NCWSC.
19. In summary, I have outlined the statutory scheme enacted for the provision of water within the country. Each WSP has exclusive jurisdiction to supply water within a specific area and is licenced as such. It follows that the petitioner has no right to receive water from NCWSC or any other water company of his choice and this Court cannot vary the term of Runda Water Service Agreement for his benefit. As the petitioner’s property falls within **LR No. 7785**, he is entitled to apply to Runda Water for the connection and as Mr Bwire conceded Runda Water will be happy to supply water to him. I would add that each WSP is licenced on condition that it meets standards of water quality and its tariffs are approved by WASREB through a process of public participation.
20. The petitioner has anchored his case on **Article 46** of the Constitution which provides as follows;

46. (1) *Consumers have the right—*

(a) *to goods and services of reasonable quality;*

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.

21. The **Water Act, 2002** which provides for the maintenance of quality of the water and regulation of tariffs and is thus consistent with the objects of **Article 46**. In essence, the intent of the **Water Act, 2002** is to provide quality water at reasonable cost to consumers. The petitioner has made vague complaints about the cost and quality of water provided by Runda Water but he has not lodged any complaint with WASREB or AWSB which have statutory authority to deal with complaints of that nature. The petitioner has not established any violation of **Article 46**. I further find and hold that the petitioner is required to source his water from Runda Water as the exclusive WSP for the area.
22. Regulation of access to roads is matter regulated by the Nairobi City County by-laws and the regulations issued by Kenya Urban Roads Board under the **Roads Act**. Both public bodies have powers to enforce their authority and ensure compliance with the conditions imposed on any development. I therefore decline to enter into a constitutional inquiry whether or not the conduct alleged is a violation of the Constitution. Not every breach of a by-law or regulation results in breach of the Constitution or requires that the Court addresses it as such. Statutory bodies charged with the responsibility of enforcing laws ought to be given an opportunity to exercise their authority before the Court intervenes to resolve the matter on the basis of the Constitution.
23. In this case, I have not seen any complaint lodged by the petitioner with either the Nairobi County or the Kenya Urban Roads Board. Neither has the petitioner alleged that these bodies have refused, failed or neglected to act on the petitioner's complaints. In his deposition, the petitioner has referred to general complaints in newspapers about the conduct of the respondents but these reports cannot form the basis of statutory action or a case. In the circumstances I decline to make a finding on the constitutionality of the breach of statutory regulations.
24. I am satisfied though, that the petitioner shall have reasonable access available to the Estate and the orders I propose to make shall deal with his concern of access. The petitioner is not a member of the Runda Association but he is a beneficiary of the common services it provides including security, maintenance and upkeep of the Estate it is not unreasonable for him to pay the fees applicable to all the members of the Association for the services which he receives. To insist that he pays for commons services provided to all residents is not a violation of his freedom of association protected under **Article 36** of the Constitution.
25. Mr Njomo submitted that the petitioner is entitled to damages prayed for at paragraph 25 of the petition as a result of the illegal and unconstitutional acts perpetrated by the respondents. The petitioner claims that he has suffered loss and damage amounting to Kshs 4,848,423/= being water connection charges, the cost of development plans approved which he has not implemented, inflation and increase in cost of materials due to related construction, opportunity cost and the cost of re-preparation of the site and remobilization of the contractor and workers.

26. Although the amount is pleaded in the petition, I have perused the affidavit in support of the petition which constitutes the evidence and it is clear that the claim is not supported by any documentary evidence, expert reports and assessments regarding the basis, nature and extent of loss and damage. The petitioner must furnish specific evidence of his loss and damage. The claims made in paragraph 25 of the petition are not proved and are dismissed.
27. In conclusion I wish to point out that the petitioner's right to own, use and develop his property is not absolute. He lives in a community of other property owners who have voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life by making provisions for certain services. The petitioner as a resident of the area cannot insist on exercising his rights without regard for the rights of others and or benefit from services without paying for them. Likewise, the respondents cannot impose unnecessary burdens on the petitioner which prevent him from enjoying his property.
28. At the end of the day the duty of the Court is to do justice to the parties. I have considered the parties' pleadings, depositions and submissions and as a result, I am of the view that the petitioner's grievances are best resolved by issuing the following orders;
- a. **The petitioner shall be at liberty to apply and the 1st respondent shall consider the petitioner's application for water connection.**
 - b. **The petitioner shall only be subject to and charged any levies applicable to all the members of the Association.**
 - c. **Subject to the petitioner complying with rules governing the residents of the Estate, the respondents are restrained from interfering with the petitioner's construction on LR No. 7785/334.**
 - d. **Either party shall have liberty to apply for further and other orders.**
 - e. **There shall be no orders as to costs.**

DATED and DELIVERED at NAIROBI this 29th day of January 2014.

D.S. MAJANJA

JUDGE

Mr Njomo instructed by Kamotho Njomo and Company Advocates for the petitioner.

Mr Bwire instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the respondents.



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