



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. M006 of 2021

(FORMERLY NAIROBI ELC PETITION NO. E016 OF 2020)

HALIMA NERIMA MUSA.....1ST PETITIONER

KYALO MUNYAO NTHIWA.....2ND PETITIONER

-VERSUS-

NAIROBI CITY WATER & SEWORAGE CO. LTD.....RESPONDENT

JUDGMENT

1. The 1st Petitioner, Halima Nerima Musa, is the wife of the 2nd Petitioner, Kyalo Munyao Nthiwa. They are the registered owners of land parcel No. Tassia-II-21190/Q/151 upon which they have sunk a borehole with the consent of the Respondent, Nairobi City Water and Sewerage Co. Ltd. The 1st Petitioner also operates Wamwika Enterprises, a water vending company whose water is sourced from the borehole.

2. The Respondent is a limited liability company duly incorporated under the Companies Act, Cap. 486 and is a licensed water and sewerage service provider mandated to provide clean water and sewer services to the residents of Nairobi City County.

3. The petitioners' case is that despite sourcing their water from their borehole and not using the Respondent's water or sewerage services, the Respondent continues to bill them for services not rendered. They aver that their complaints to the Respondent have been met by threats to block their sewerage entry way into the main sewer. Further, that the Respondent had refused or failed to connect a sewerage line for the removal of sewage from their parcel of land. The petitioners also claim that they have been denied the right to internal review or appeal. According to the petitioners, the Respondent's actions violate their rights not to be discriminated; to adequate housing and reasonable standards of sanitation; and to fair administrative action as entrenched by Articles 27, 43 and 47 of the Constitution.

4. The petitioners through their petition dated 5th October, 2020 therefore seek orders as follows:

i. A declaration that the petitioners are entitled to the fundamental rights and freedoms as guaranteed under Articles 2, 10, 22, 23, 27, 43(b)&(d), 47, 48, 50 and 258 of the Constitution of Kenya and the relevant statutes.

ii. A declaration that the actions and omissions of the Respondent are in gross violation of the fundamental rights and freedoms of the petitioners, guaranteed as set out under Articles 2, 10, 22, 23, 27, 43(b)&(d), 47, 48, 50 and 258 of the Constitution of Kenya and the relevant statutes.

iii. An injunction restraining the respondent, its servants, agents or others acting on its behalf from further charging the petitioners herein for water and sewer services for account number 2537026.

iv. An order of mandatory (sic) compelling the respondent to connect sewerage systems and facilities on land parcel number L.R. No. Tassia-II-21190/Q/151.

v. An order compelling the respondent to refund the monies paid to it by the petitioners since the year 2016 for account number 2537026.

vi. Compensation for breach of fundamental rights and freedoms.

vii. The costs of this suit be borne by the Respondent.

viii. Any other relief that the Court may deem fit and just to grant.

5. The petitioners also filed a notice of motion seeking interim relief together with the petition. That application was, with the consent of the parties, subsumed in the petition.

6. Through grounds of opposition dated 5th March, 2021, the Respondent opposed the notice of motion on five grounds. First, that the petitioners sought two contradictory orders, one seeking to bar the Respondent from levying sewer charges on her property and the second to compel the Respondent to provide sewer charges. Second, that the petition is an abuse of the court process as the petitioners did not disclose the existence of another case of a similar nature in the Environment and Land Court. Third, that the application did not disclose a *prima facie* case with likelihood of success to warrant grant of temporary injunction. Fourth, that the balance of convenience was in favour of the Respondent. Finally, that the petitioners faced no imminent threat that could not be compensated by damages.

7. The Respondent opposed the petition through a replying affidavit sworn on 5th March, 2021 by Eric Simiyu Juma the Respondent's technical coordinator for the Eastern Region. The Respondent avers that this petition is misplaced and misconstrued as it seeks two inconsistent prayers; an order stopping the Respondent from disconnecting the sewerage services and a contradictory order compelling the Respondent to connect the petitioners to its sewerage line.

8. It is the Respondent's case that the petitioners' sewer line was constructed without its knowledge or approval. The Respondent avers that there is no evidence that the construction of the petitioners' sewer line complied with the laid down procedure. It is further averred that a visit to the petitioners' property revealed that their sewerage system was substandard and was susceptible to perennial blockage as they continued to illegally connect other users. According to the Respondent, the visit also established that the petitioners' sewer line terminated at its main line.

9. In conclusion, the Respondent deposes that the petitioners have come to Court with unclean hands as they collected revenue from the other persons that they have connected to the sewer line without remitting the same to it. Further, that the petitioners have failed to establish any contravention or breach of their constitutional rights and fundamental freedoms by the Respondent.

10. Through their submissions dated 5th August, 2021, the petitioners submitted that they applied for and received approval to drill a borehole and sell water from the borehole. It is their case that they never applied for approval to construct a private sewer line and neither is there evidence to show that they had constructed a private sewer line on their property. They relied on the decision in the case of **Kaigokem and Partners Limited & another v Nairobi City Council & 2 others [2020] eKLR** for the submission that the process of application, authorization and making of a sewer line is unique. The petitioners contend that since they have no sewer line of their own they cannot be said to have connected other users thus denying the Respondent revenue.

11. The petitioners asserted that they were not connected to the Respondent's sewer line and they were therefore not obligated to pay charges billed by the Respondent for sewer services. Further, that due to the Respondent's refusal to connect them to its sewer line, they had sought sewer services from a private sewer line. The petitioners submitted that they should be refunded all the money they had paid to the Respondent for services not rendered since 2016.

12. On whether their rights were infringed, the petitioners submitted that their right to adequate and reasonable standards of sanitation under Article 43(b) and the right not to be discriminated against under Article 27 against were infringed by the Respondent.

13. On their claim for damages, the petitioners relied on the case of **MWK & another v Attorney General & 3 others [2017] eKLR** to submit that they are entitled to damages as a result of the infringement on their rights.

14. Responding to the accusation that they have abused the court process by filing parallel cases on the same issues in different courts, the petitioners submitted that they had instructed their former advocates to withdraw *Nairobi ELC Civil Suit No. E045 of 2020* which raise issues similar to the issues in this case and therefore there was no other pending suit. The petitioners urged this Court to grant the prayers sought as well as the costs for the proceedings.

15. The Respondent's submissions are dated 20th September, 2021. In support of its assertion that the petition is incompetent, the Respondent submitted that the same does not meet the competency threshold for constitutional petitions. The Respondent argued that despite the petition being anchored on Articles 2, 10, 22, 23, 27, 43(b)&(d), 47, 48, 50 and 258 of the Constitution, the petitioners only addressed Articles 2, 21(1), 27, 43(b) and 47(1). The decision in the case of **Anarita Karimi Njeru v Republic [1979] eKLR** was cited as establishing the principle that a person seeking redress through a constitutional petition should set out with a degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.

16. The Respondent submitted that this petition is an abuse of the court process as *Nairobi ELC Civil Suit No. E045 of 2020* was still pending in Court at the time of the filing of this petition. Further, that the petition is an abuse of the court process since it is based on insincerity with regard to the reliefs sought as well as non-disclosure of material facts.

17. According to the Respondent, the petitioners had failed to prove violation of any of their constitutional rights. It was stated that the petitioners had not applied for the sewer services or approvals for the construction of a private sewer line even though their sewer line terminates in the Respondent's main sewer line. The Respondent relied on the case of **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** to argue that the petitioners have failed to meet the evidential threshold required of a claimant alleging violation of economic and social rights.

18. As to whether the petitioners are entitled to the reliefs sought, the Respondent submitted that they were not, as there are disentitling factors in this petition. The Respondent contended that the petitioners have come to Court with unclean hands and do not deserve the reliefs sought in the petition. To this end, they relied on the case of **Siteya v Gitome & 3 others [2015] eKLR**. In conclusion, the Respondent urged this Court to dismiss the petition in its entirety.

19. Upon perusal of the pleadings and submissions of the parties, I find that the issues for the determination of this Court are:

- i. Whether the petition offends the doctrine of *sub judice*;
- ii. Whether the rights of the petitioners were infringed by the Respondent;
- iii. Whether the petitioners are entitled to the reliefs sought; and
- iv. The costs of the petition.

20. The *sub judice* rule is spelt out in Section 6 of the Civil Procedure Act, Cap 21 as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

21. The Supreme Court of in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)** [2020] eKLR had this to say on the principle of *sub judice*:

“[67] ... The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

22. The rule is meant to prevent courts of competent jurisdiction from contemporaneously entertaining trial of two parallel suits in respect of the same subject matter. For the doctrine to be successfully invoked it must be shown that the issues and remedies sought in one suit are substantially the same as those in the other suit.

23. The Respondent raised, as a ground of opposition, the fact that as at the time of filing this petition, there was a pending suit before the Environment and Land Court being *Nairobi ELC Civil Suit No. E045 of 2020*, filed by the petitioners against the Respondent. On their part, the petitioners have submitted that they had instructed their advocate to withdraw the suit and therefore there was no pending case.

24. It is not disputed that at the time this petition was filed on 24th September, 2020, *Nairobi ELC Civil Suit No. E045 of 2020* was still subsisting and was only withdrawn in the course of the hearing of this petition. There is also no dispute that the parties and the issues in the two matters are the same. However, in order to do substantive justice in this matter, I will rely on the petitioners’ submission that *Nairobi ELC Civil Suit No. E045 of 2020* has since been withdrawn and the defence of *sub judice* cannot therefore hold in the circumstances of this case.

25. I now turn to the question as to whether the petitioners have established a violation of their constitutional rights by the Respondent. The main complaint by the petitioners is that the Respondent violated their right under Article 43(1) of the Constitution. The relevant part of the provision states:

43. (1) Every person has the right—

(a) ...;

(b) to accessible and adequate housing, and to reasonable standards of sanitation.

26. The petitioners allege that their rights to adequate and reasonable standards of sanitation under Article 43(b) and not to be discriminated under Article 27 have been infringed by the Respondent. They also claim that the Respondent was in breach of Article 47 which provides the right to fair administrative action. It is their position that by refusing to connect their property to the main sewer line, the Respondent has failed to guarantee them the right to adequate and reasonable sanitation. They also argue that by levying sewer charges against them for services not rendered, the Respondent discriminated against them thereby infringing on their right not to be discriminated. Further, that by failing to provide a review or appeal mechanism, the Respondent had violated their right to fair administrative action.

27. The Respondent on its part argue that the petitioners have never applied to be connected to the main sewer line. The Respondent submits that the petitioners proceeded to construct an illegal sewer line on their property without its approval. Further, that the illegally constructed sewer line terminates at its main sewer line and it is therefore entitled to sewerage charges from the petitioners.

28. In this case, the conflict between the parties arise from the provision of sewer services to the petitioners. The petitioners have stated that they have never made any application for sewerage services from the Respondent. They also deny having constructed any sewer line despite having acknowledged that fact in their petition and supporting affidavit. The petitioners also aver that they have complied with the conditions set in the license issued to them for the drilling of a borehole.

29. What were the conditions placed on the authorization granted to the Petitioner for drilling the borehole" In the no objection letter of 30th June, 2015, the Respondent attached conditions that no interconnection will be allowed between the borehole water and the existing Nairobi City Water and Sewerage Company water system; that the petitioners will install a separate meter for the borehole water to facilitate the levying of sewer charges if the premises is to be served by the Respondent's sewer system, and for borehole output record; that the petitioners would comply with conditions from both the Ministry of Water and Irrigation, and the Water Resources and Management Authority.

30. It is evident that the separate meter was meant to facilitate levying of sewer charges if the premises were to be served by the Respondent's sewer system and also as a record of the borehole output. The letter dated 7th August, 2015 from the Water Resources Management Authority to the petitioners include a condition that the borehole was to be deployed for domestic use only. However, the petitioners have averred and attached documents which prove that the borehole has been used for commercial purposes as they are currently engaged in the business of bottling and selling drinking water. This appears to be a breach of the conditions of the licence even though the Respondent has not complained about this state of affairs in its pleadings.

31. The Respondent in the replying affidavit as well as submissions has stressed that its main sewer line is accessible to the petitioners and that in fact, the petitioners' sewer line terminates at its main line. This, however, is not substantiated by any documentary evidence other than the deposition in the replying affidavit. The petitioners on their part have denied having a private sewer line but have also not tendered any document to support this assertion.

32. The unanswered question is where do the petitioners drain their sewer products" The averments of the parties lead to the logical conclusion that the Respondent's position is the correct one. The petitioners having denied owing a private sewer line were under obligation to provide evidence of the existence of the private sewer line which they claim they discharge their waste products to. Having disowned the private sewer line, the petitioners have not succeeded in rebutting the Respondent's assertion that the private sewer line serving the petitioners terminates at its main sewer line.

33. The Respondent's position is also strengthened by the fact that among the prayers sought by the petitioners in their application for interim relief is one stopping the Respondent from denying them access to its sewer line. If the petitioners were not discharging their waste to the Respondent's sewer line why would they seek such an order" It is therefore my finding based on the pleadings before this Court that the petitioners' sewer line is connected to the Respondent's main sewer line notwithstanding the fact that they never applied or received approval to connect their sewer line to the Respondent's sewerage network.

34. The Respondent has also averred that their main sewer line is accessible to the petitioners if they wish to be connected. This being the position, and in the absence of evidence to show that the petitioners made an application to be connected to the sewer line, it cannot be said that their rights to access sewer services was violated. In this regard, I am guided by the case of **Kaigokem and Partners Ltd & another v Nairobi City Council & 2 others [2020] eKLR** where it was held that there is a procedure for connection to the Respondent's sewerage line.

35. The petitioners could have only succeeded in establishing violation of their rights if they had first complied with the laid down requirements for the acquisition of the permit for connection or for construction of a privately owned sewer line. In absence of an application by the petitioners, they cannot be heard to complain of violation of their right to adequate and reasonable standards of sanitation.

36. For the same reason, a similar fate befalls the petitioners' claim that their right not to be discriminated against was violated. They have not shown in what manner the Respondent treated them differently from other consumers of its services and neither have they identified the other users of the Respondent's services who were given preferential treatment.

37. There is also no merit in the petitioners' claim that their Article 47 right to fair administrative action was violated by the Respondent. They have not shown that they sought a review or appeal against the Respondent's demand for payment of services rendered and that their requests were not acceded to. A demand for a levy for a service that has been rendered cannot be termed a violation of constitutional rights. In order for the Respondent to be able to provide sewerage services or any other services it must collect fees for the services rendered.

38. Having found that there was no violation of the petitioners' rights by the Respondent, it follows that the reliefs sought before this Court cannot be granted.

39. Additionally, I also take note of the way the petitioners have shifted the goalposts with regard to the ownership and operation of a privately owned sewer line. The inference one can make from the pleadings is that this petition was based on inconsistency and dishonesty. The petitioners want court orders directing the Respondent to provide them with free sewerage services. That is not the function of courts. The petitioners ought to follow the process outlined by the law so as to legally benefit from the Respondent's sewer services. It therefore follows that the prayers sought by the petitioners are declined. The notice of motion and petition dated 24th September, 2020 are hereby dismissed.

40. On the issue of costs, I find that it is in the interest of justice for each party to meet own costs of the proceedings. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 26TH DAY OF NOVEMBER, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT



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