



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION MISC. NO. 434 OF 2020

IN THE MATTER OF RIGHT TO LIFE ARTICLE 26, AND LIBERTY, HUMAN DIGNITY ARTICLE 28,

RIGHT TO EDUCATION, PROTECTION OF RIGHT TO PROPERTY ARTICLE 40, ARTICLE 43,

RIGHT TO ENVIRONMENT, ECONOMIC AND SOCIAL RIGHTS

AND ARTICLE 46 CONSUMER RIGHTS

AND

IN THE MATTER OF THE PUBLIC HEALTH ACT

PHILIP AJWANG ONYANGO.....1<sup>ST</sup> PETITIONER

ROSEMARY NDEGWA..... 2<sup>ND</sup> PETITIONER

ESTHER KEBESA.....3<sup>RD</sup> PETITIONER

PATRICK AMBIA.....4<sup>TH</sup> PETITIONER

ANNE WANJIKU GITONGA..... 5<sup>TH</sup> PETITIONER

MARGARET THUMBI.....6<sup>TH</sup> PETITIONER

SAMUEL CHEGE.....7<sup>TH</sup> PETITIONER

SUING ON BEHALF OF (B O, K S, RW, D YA, S N B O AND JO).....MINORS

VERSUS

CABINET SECRETARY MINISTRY OF HEALTH .....1<sup>ST</sup> RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION ..... 2<sup>ST</sup> RESPONDENT

CABINET SECRETARY INTERIOR MINISTRY.....3<sup>ST</sup> RESPONDENT

HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

JUDGMENT

**Introduction**

1. The petitioners in their undated petition supported by the affidavit of Philip Ajwang Onyango (1<sup>st</sup> petitioner) dated 28<sup>th</sup> December, 2020

sued the respondents claiming that the 1<sup>st</sup> – 3<sup>rd</sup> respondents have neglected their duties relating to the minors on whose behalf the petition is filed. They claim that there are evictions which were to commence on 29<sup>th</sup> December, 2020 and which would have catastrophic negative effect on the minors' education and health rights.

2. The 1<sup>st</sup> petitioner has averred that the petitioners were in compliance with the orders in ELC No.584/2014, and are seeking directions on how the respondents should assist and/or carry out their duties as regards the same matter. He avers that in respect of the intended evictions they want the 1<sup>st</sup> respondent compelled to provide proper modalities and mechanisms as per the Ministry of Health Covid-19 Rules to cover the minors during the migration and shifting of the petitioners among others.

3. He deposes that the petitioners need modalities put in place as concerns the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' dockets at the time of migration and shifting of the petitioners. They claim that the respondents have abdicated their duties and obligations in as far as the petitioners are concerned.

4. The petitioners therefore seek the following orders;

(i) A declaration that the respondents have infringed, threatened, the fundamental rights of the petitioners leave alone the public health, acted unconstitutionally by failing to act accordingly and implement modalities, mechanisms, features.

(ii) Any further orders, writs, directions as this honourable court may consider appropriate.

(iii) Costs of the petition.

#### **Respondents' case**

5. The respondents filed a response to the petition vide a replying affidavit by Patricia Chibole sworn on 27<sup>th</sup> April, 2021.

6. She has averred that the present petition raises similar issues to those raised in:

(i) **Nairobi Constitutional Petition No.584 of 2014** - Justus Muthumbi & 9 others V the Cabinet Secretary, Ministry of Lands, Housing and Urban Development & 4 others, and

(ii) **Nairobi Constitutional Petition No.296 of 2019** – Adan Katana Shahenza (suing on behalf of 300 residents of Starehe & Shauri Moyo Estates Nairobi) V. Cabinet Secretary, National Treasury and 3 others.

7. She denied that in Pet. No.584/2014 the petitioners therein sought inter alia orders to restrain/prohibit the respondent from interfering with their tenancy with regard to the suit premises. Further she averred that in the **petition No.296/2019** the petitioners therein sought orders inter alia directing the respondents not to evict them and/or demolish their respective houses at Starehe and Shauri Moyo Estates Nairobi. Judgments in the two matters were delivered by Justice Mativo and Justice Makau on 28<sup>th</sup> May, 2018 and 30<sup>th</sup> July, 2020 respectively. A copy of judgment in **Petition No.584 of 2014** was annexed as PCIA.

#### **Petitioners' submissions**

8. Gregory Ndege and Associates advocates for the petitioners filed submissions dated 21<sup>st</sup> September, 2021. Counsel has submitted that the two mentioned petitions addressed different issues from what is before the court. The present issues he argues relate to health and education, which were not addressed in the earlier petitions.

9. Counsel submits that the petitioners have come under Articles 23, 40 and 43, and allege that the 2<sup>nd</sup> respondent has infringed Article 43 of the Constitution and 53(1) of the Education Act Cap 211 of the Laws of Kenya.

Section 3(1) of the Education Act provides:

***“The Minister shall promote the education of the people of Kenya and the progressive development of institutions devoted to the promotion of education, and shall secure the effective co-operation, under his general direction or control, of all public bodies concerned with education in carrying out the national policy for education.”***

10. Counsel submits that the movement of school going children alongside Covid-19 would disrupt their education. That Covid-19 has grossly and negatively altered the education curriculum of the country.

11. Citing Articles 21, 23, 26, 28 and 43 of the constitution, sections 5, 14 and 15 of the Health Act counsel argues that due to the Covid-19 pandemic, the state should develop policies, laws and measures that will improve and promote the health of all people. He contends that the 1<sup>st</sup> respondent failed to ensure the vaccination of the petitioners. Finally he admits that Covid-19 vaccine is currently being administered, and the petitioners have taken steps towards that.

#### **Respondents' submissions**

12. The respondents filed submissions through P. A. Chibole learned Senior State Counsel. The same are undated. She raises two issues for

determination which are:

- (i) Whether the respondents' conduct constitutes a violation and contravention of the Constitution of Kenya 2010;
- (ii) Whether the issues raised herein have been determined in **Nairobi High Court Constitutional Petition 584 of 2014** (*supra*) and **Nairobi High Court Constitutional Petition 296 of 2019**(*supra*) .

13. On the 1<sup>st</sup> issue counsel submits that the petitioners have failed to identify the allegedly infringed rights with precision as was stated in the case of (i) **Anarita Karimi Njeri v Republic [1976 – 1980] KLR 1272** and (ii) **Mumo Matemu vs Trusted Human Rights Society Petition No.229 of 2012**. Referring to **Constitutional Petition No.584 of 2014**, she submits that the petitioners were found to be service tenants who are paid house allowance and the respondents are under no obligation to provide any modalities and/or mechanisms for their shifting from the housing scheme.

14. She adds that the 1<sup>st</sup> respondent has given sufficient guidelines on the management of Covid-19 in Kenya. Secondly the covid-19 vaccination was in top gear with inoculation centres being set up in public spaces like malls, markets and bus stops.

15. Counsel submits that the petitioners have failed to show that they have school-going children and elderly people who will be affected by the movement. They have instead taken their sweet time to move out since delivery of the judgment in 2018 in **Petition No.583 of 2014**. She referred to the following cases in support of the submission:

- (i) **Kulray Singh Bhangra v Director General, Kenya Citizens & Foreign Nationals Management Service [2014] eKLR.**
- (ii) **Kamal Jadv Vekaria V Director General, Kenya Citizens & Foreign Nationals Management Services [2016] eKLR.**

16. Counsel submits that this petition is similar to **Petition No.584/14** and **Petition No.296 of 2019** both of the Constitutional Court Nairobi. She has referred the court to paragraphs 55 and 56 of the judgment in **Petition No.584 of 2014**. She adds that no appeal has been preferred against the said judgment. Further that an application seeking stay of execution pending appeal was dismissed and the court stated thus:

*“My finding is that the applicants did not prove that they stand to suffer substantial loss if the stay is not granted. The applicants did not demonstrate that they are not able to secure alternative accommodation for themselves. It was not enough for the applicants to merely state that they had and that substantial loss will result. They needed to prove specific details and particulars regarding the same. In the Machira t/a Machira & company Advocates cases (*supra*), the court observed that “ ... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...” (emphasis mine).*

17. Counsel refers to **Petition No.296 of 2019** which was dismissed on account of being *res judicata* in respect of **Petition No.584 of 2014**. She also referred to the case of **Machira t/a Machira & Co advocates v E. African Standard (No.2) [2002] KLR 63** where it was held that:

*“...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.*

18. Counsel contends that this being a public interest litigation, no costs should be awarded.

### **Analysis and Determination**

19. I have considered the petition, affidavits, submissions, authorities cited plus the Law. I find three issues falling for determination and these are:

- (i) Whether this suit is *res judicata*.
- (ii) Whether the petitioners have established a case of violation of their constitutional rights as pleaded.
- (iii) Whether the petitioners are entitled to the reliefs sought.

#### **Issue No. (i) Whether this suit is *res judicata***

20. From the petition the petitioners reside in Nairobi City County Starehe Constituency. This is what they state at paragraph 3 of the petition.

*“That in compliance with orders issued in ELC No.584/2014 the petitioners herein willing (sic) to comply with the same move this court seeking expedient directions on how the respondents herein are to assist, carry out their duties in regards to the same.”*

21. The respondents have made mention of Constitutional Petitions No.584/2014 and No.296/2019. The petitioners in petition No.584/14 were 327 occupiers/tenants of Starehe and Shauri Moyo government estates Nairobi and their 200 school going children. The petitioners herein have clearly stated their willingness to comply with the orders issued in the judgment in the said petition.

22. What then are the orders that were issued in Petition No.584/2014? One of the prayers in the said petition which is also sought for in this petition is found at paragraph 15 (e) of the Judgment. The prayer is as follows:

***“ A DECLARATION that the issuance of the vacation notices to the petitioners requiring them to vacate the suit premises without providing them with alternative housing/accommodation is a threat to the petitioners children’s right to free and compulsory basic education and to their basic nutrition, shelter and healthcare and the right against being treated in a cruel and inhuman manner and being subjected to all forms of violence as guaranteed under Article 53(1) (B) (C) and (d) of the Constitution.”***

23. Justice Mativo set out this prayer at paragraph 55 of the judgment and the answer to it is found at paragraph 56 where the Hon. Judge stated:

***“As stated above, the petitioners are service tenants. They admit having been served with notices to vacate. They are or were being paid house allowances, hence the first respondent was under no legal duty to furnish them with alternative accommodation.”***

24. In his final decision Justice Mativo dismissed the petition for being without merit.

25. Soon after the delivery of the judgment on 28<sup>th</sup> May, 2018, another **petition No.296/2019** was filed by 301 petitioners from Starehe/Shauri Moyo estates Nairobi. They raised similar issues on the intended eviction. The said petition was struck out and dismissed by Justice Makau for being *res judicata* by virtue of **Constitutional Petition No.584/14**. The dismissal was on 30<sup>th</sup> July, 2020.

26. The present petition was filed on or about 7<sup>th</sup> January, 2021. From the pleadings and submissions it is clear the petitioners are yet to comply with the orders as per the judgment in Constitutional **Petition No.584/2014**. The hindrances they claim, have been caused by Covid-19 which is affecting the children’s health and basic education. They accuse the 1<sup>st</sup> – 3<sup>rd</sup> respondents for not making the necessary provisions and arrangements for them.

27. The petitioners had a duty to clearly demonstrate before this court what the respondents have failed to do. If it is about their health and Covid-19 its within public knowledge what the government is doing to manage this pandemic without any discrimination. It does not matter whether one lives in Lavington, Karen, Starehe, Shauri Moyo or Kibera, of Nairobi.

28. The vaccinations are free. There is free hand washing and sanitizers all over. Counsel for the petitioners has submitted that the respondents have to ensure that all the persons in Starehe/Shauri Moyo are vaccinated before they can move out. I find this to be too demanding of the State. Why are the petitioners not presenting themselves and their adult children for vaccination?

29. The other issue raised is on basic education. It is not clear what the petitioners expect from the 3<sup>rd</sup> respondent. Is he supposed to go and book schools for them before they move out? How would the Cabinet Secretary know where these children are being accommodated in order for him to secure schools for them in the vicinity? I am just mentioning all this to show how remote these prayers are to meet the requirements of any violation of a right.

30. These issues were very well covered in **Constitutional Petition No.584/14**. The petitioners have just brought the same issues but now twisted them to refer to children’s rights. Even **Petition 584/14** addressed the very children’s rights to Education and Health. He who alleges a fact must prove it. Let the petitioners comply with the Notices issued and settle in their new houses/homes. These issues they are coming up with, are issues which should be addressed through the administration from wherever they are or will be.

31. For my part I find the issues raised here to be similar to those raised and determined in **Constitutional Petition Nos.584/14 and 296/19**. I therefore strike out the petition for being *res judicata*. There shall be no orders for costs.

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 24TH DAY OF MARCH, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG’UDI**

**JUDGE OF THE HIGH COURT**