



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 66 OF 2014

IN THE MATTER OF ARTICLES 2,3,6,10,19,21,22,23,25,26,27,28,

29,35,40,43,47,48,50,165,186 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 26(1) &(3), 27(1) &

(2) , 28, 29 (c) AND (d) , 40, 43 AND 47 OF THE CONSTITUTION

SIMON SANGALE NASIEKU.....1ST PETITIONER

RONALD ABUGA NYAMIKA.....2ND PETITIONER

RAHAB MUGURE.....3RD PETITIONER

(Suing on their own behalf and as Chairperson, secretary and Treasurer respectively

and on behalf of all Members of the Nakuru Street Traders and Hawkers Association)

-VERSUS-

THE COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

KINUTHIA MBUGUA.....2ND RESPONDENT

RULING

1. The Application before me is dated 13/10/2020. The Applicant is seeking the following orders:

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to issue a mandatory injunction compelling the First Respondent and the successor to the Office formerly held by the Second Respondent either by themselves, their agents, servants, employees, successors or assigns to comply with the consent order of this Court made on 20th January 2015 by allocating and or causing to permanently occupy on a first serve and priority basis the 411 out of the 700 stalls currently unoccupied and situate in Nasher Square Market upper Floor pending the hearing and determination of this Petition.

4. THAT the costs of the application be provided for.

2. The Application is supported by the grounds on the face of it and the Affidavit of Simon Sangale Nasioku dated 13/10/2020. The

Applicants' account is that from early January 2015, the 1st Respondent evicted Applicants from various places within the Central Business District of Nakuru Town (CBD) where they were carrying on of business, under the allegation of reorganizing the town. After evicting them the 1st Respondent allocated space to 1,353 of the 1,764 traders. This resettlement was done after a joint verification between the 1st Respondent and the Applicants which confirmed that the Applicants were members of an Association that deserved to be allocated space.

3. According to the Applicants, their advocates and the 1st Respondent's advocates entered a consent on 20/01/2015, where the Respondent would provide trading space for the remaining 411 traders (23.5 %), who were yet to be allocated space. The other terms of the consent were that the 1st Respondent would allocate space to each of the 411 traders and the resettlement would be conducted jointly by the officials of the Petitioner and the 1st Respondent.

4. The Applicants contend that to date, the 411 Applicants are yet to be resettled, yet they have learnt of available 700 spaces at Nasher Square Market upper floor which the 1st Respondent intends to allocate to other persons who are not among the Petitioners, to the exclusion of the Applicants.

5. According to the Applicants, this denial continues to cause untold misery and suffering to the 411 Applicants and continues to deny them and their families proper socio-economic rights, their livelihood and is in disobedience of the Court Order of 20/01/2015. The Applicants also allude to a clear indication by the Successor of the Office previously held by the 2nd Respondent that the 1st Respondent intends to allocate the stalls by 10/10/2020 or soon thereafter by his Facebook post, dated 29/09/2020, yet the 1st Respondent has declined their request to allocate the stalls to the 411 Applicants

6. The Applicants want the 1st Respondent to be restrained from allocating the said space and that the same be allocated to the 411 Applicants instead.

7. The 1st Respondent opposed the Application through the Affidavit dated 23/10/2020, sworn by Dorcas Njeri, the Acting Director, Trade at the 1st Respondent. She deposes on the commitment by the 1st Respondent to have business in Nakuru conducted in an orderly manner and the need to provide access to trading areas in a free and fair environment. According to her, the Petitioners were settled in various places where they are carrying on business and all street traders were settled in various places in the terms of the Consent recorded in Court where they have been peacefully trading.

8. She claims that there are certain traders who have not been trading for the past five years, and now want to be allocated space. To her knowledge, the only complaint raised by the street traders was the poor sanitation and the 1st Respondent dealt with the issue by erecting sanitation facilities.

9. She also deposes that the Nasher and main Markets were closed due to Covid 19 Pandemic and reopened in September 2020 and that the Ground Floor of Nasher Market now accommodates 500 traders instead of the initial 800. According to her, the upper deck of the Nasher Market is under construction and is not ready for occupation and once complete, the same will be allocated through balloting, and priority given to those traders who were trading before being displaced by the reorganization.

10. She states that due to the upsurge in COVID 19 cases, the 1st Respondent may be forced to take mitigating measures including reducing the number of traders at Nasher Market. It is also her deposition that priority will be given to those traders who have been trading at Nasher Square when the construction is complete and a new market at Fire Station will accommodate about 2000 traders.

11. In response, the Applicants filed affidavits dated 26/08/2021 and 30/10/2020 sworn by 1st Applicant. He insists that the 1st Respondent is yet to resettle the remaining 411 traders. and denies any complaints by the Applicants about sanitation as alleged. He deposes that the Respondent has not given any evidence to the effect that the evicted traders were allocated space and that even with 300 allocated spaces, part of the remaining traders ought to be given priority over the remaining spaces. He states that it is contrary to justice for the 1st Respondent to apply balloting in allocating spaces when the 411 Applicants have not been allocated space.

12. The Respondents in their further Affidavit dated 03/11/2021 sworn by Dorcas Njeri insist that the Petitioners were settled in various places and are carrying on business. She also deposes that she called some of the Petitioners on the list and established that some of them were either not members of the Nakuru Street Traders and Hawkers Association, had relocated from Nakuru or were not aware of the instant Petition.

13. She reiterates that some of the Petitioners have not been trading for the past 5 years and were only waiting for the Respondent to construct the upper deck of Nasher Market for them to demand stalls. She states that the new market is only at 53% completion and is projected to be completed in March 2022 and that the same has been organized to accommodate persons carrying out different activities are allocated specific areas to create order. According to her, once the construction is complete, mechanisms will be put in place for the purpose of allocation and allocation of space in the manner suggested by the Applicants would therefore create disorder.

14. She contends that the prayers not having been sought in the main Petition, the same cannot be granted in the present application without amending the Petition and that a mandatory injunction cannot be granted as a mode of execution for the Consent Order dated 20/01/2020

15. The Application was canvassed by way of written submissions; the Applicants' submissions are dated 10/11/2020 and 30/09/2021. On whether this Court should grant a mandatory injunction, the Applicants rely on the case of *Kenya Breweries Ltd. & Another v Washington O. Okeyo [2002] eKLR* and submit that there should be exceptional and special circumstances to warrant the order such as the Defendant stealing a match against the Plaintiff. The Applicants also rely on the case of *Robai Kadili Agufa & Another v Kenya Power & Lighting Co. Ltd. [2015] eKLR*. They submit that the requirement is in addition to the requirement for establishing a prima facie case established in *Giella v Cassman Brown & Co. Limited [1973] EA 358*.

16. The Applicants cite the case of *CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK) Being sued through its officials namely Stephen Mutoro & 2 others [2014] eKLR*. They submit that they have met the threshold for the grant of a mandatory injunction because they have demonstrated exceptional and special circumstances to warrant the same. The special circumstance, the Applicants contend are that firstly, there is a Consent Order between the parties which has not been complied with by the Respondents and the Applicants continue to suffer because of this noncompliance.

17. Secondly, the applicants contend that the 1st Respondent stole a match on the Applicants by evicting them despite a Court Order and leaving them without a place of business. The Applicants therefore submit that the case can be remedied by the grant of a mandatory injunction because it has been 5 years since the Applicants were evicted.

18. The Respondents' submissions are dated 09/11/2021. The Respondents first argument is that the Court cannot grant a mandatory injunction where the same is not sought as a prayer in the main Petition. The Respondents rely on the case of *Kihara v Barclays Bank (K) Ltd [2001] EA 420* in support of their argument that an application for injunction must be made in a suit where the Applicant has sought the relief of a permanent injunction.

19. The Respondents' second argument is that a mandatory injunction is not one of the modes of execution provided for under Section 38 of the Civil Procedure Act.

20. On the issue of a grant of mandatory injunction, the Respondents rely on the principles for grant of injunction enunciated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*. The Respondents argue that the Court ought to be careful in granting a mandatory injunction since it determines the issues in a summary manner and it would prejudice the party against whom the mandatory injunction is given if in the end, the Applicant turns out to have been undeserving. To this end, the Respondents rely on the cases of *Shepherd Homes Ltd. V Sandham [1971] 1 Ch. 34*, *Locabail International Finance Ltd. V Agroexport [1986] 1 ALL E. R.901*, *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva, AIR 2003* and *Nandan Pictures Ltd v Art Pictures Ltd & Others, AIR 1956, CAL 428*. The Respondents deny that the Applicants have met the special circumstances required for the grant of a mandatory injunction at the interlocutory stage.

21. The Respondents also deny that the Facebook post relied on by the Applicants is from a Page owned and run by the successor of the 2nd Respondent, because the same does not bear the verification mark. They cite the case of *Kenya Power and Lighting Co. Ltd v Mwilwa Dase Investment Co. Ltd [2020] eKLR* where it was held that a Court of law ought to act only based on certainty and not presumption or speculation.

22. The Respondents allege that in any event, the Applicants have misinterpreted the Facebook Post since the same only referred to reopening of the market and never reopening of the upper floor of the Nasher Square Market. Additionally, the Respondent argues that to instruct them to allocate specific spaces to the Applicants would be to micromanage its affairs, which is impermissible in law.

23. On the issue of costs, the Respondent urges that the same be dismissed with costs and cites the cases of *Tinyefuze v Attorney General of Uganda [1997] UGCC3* and *Jasbir Signh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR*.

24. From foregoing, the main issue for determination is whether the Applicants have met the threshold for a grant of a mandatory injunction at the interlocutory stage. But first, the preliminary issue for determination is whether the Applicants are barred from seeking a mandatory injunction in the absence of a similar prayer in the Petition.

25. The Respondents have argued that not having sought a mandatory injunction in their Petition, the Applicants cannot do so in an application without amending their Petition. In the *Kihara Case*, cited by the Respondents, the Court determined an application for an interlocutory injunction to restrain the Defendant from selling property pending the hearing and determination of the suit. *Ringera J.* made an interpretation of Order XXXIX Rule 2 of the then Civil Procedure Rules. It was the Learned Judge's interpretation that for one to make an application for temporary injunction, the main suit must contain a prayer for a permanent injunction.

26. The circumstances of this case are evidently distinguishable from that case. While it is true that the Applicants herein are seeking a mandatory injunction in the absence of a prayer for the same in the main Petition, the Applicants already have a Consent Order in their favour. That prayer can, therefore, not be said to have been made in a vacuum.

27. I will now turn to the question whether the Applicants ought to be granted a mandatory injunction. Both parties agree that a mandatory injunction should only be granted at the interlocutory stage if there are special circumstances. In *Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR* the Court of Appeal gave examples of what would amount to exceptional circumstances as follows: -

Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to restrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a match on the plaintiff.

On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing”.

28. The circumstances in this case are that there is already a Consent Order on Record. The Consent Order dated 20/01/2015 reads in part:

THAT the County Government to find suitable space to resettle the Petitioners who have not been resettled within the next 14 days

and the resettlement exercise be conducted jointly by the officials of the Petitioner and the County Government.

29. It has been more than five years since the Order for resettlement was made. Save for stating that they have resettled traders, the Respondent has not provided any cogent proof of the resettlement exercise which was to be carried out jointly by the two parties. Had the resettlement exercise been conducted, the Respondents would have verified the status of the individuals they now claim they have either relocated or are not aware of the existence of the matter, just as they did in the first resettlement.

30. Be that as it may, it has been five years since the order was given, the Applicants have also not made any attempt to execute the order until the filing of this Application. The nature of the present application is such that it would require this Court to direct that the Respondent specifically on how the Respondent should allocate space within its markets. It is a now a well-established principle that the Courts cannot compel a public body or a County Government in this case, to perform its functions in a particular manner. I associate myself with the sentiments of *Makau J.* in *Apollo Mboya v Attorney General & 3 others; Kenya National Commission On Human Rights (Interested Party) & another [2019] eKLR* that in a case where the Respondent enjoys discretion in the manner of performance of a duty no order can issue directing Respondent to perform the duty in a particular manner. It would be imprudent for the Court to order the Respondents to allocate the specific stalls to the Applicants. This is, in part, because the Respondent may have other enforceable obligations respecting the stalls. It is, in any event, impermissible trammelling on the executive arena to require a public body to perform its duty in a specific manner.

31. Consequently, I cannot make the orders the Applicants pray for. However, as aforesaid, it has been five years since the parties entered into a Consent. It is time the Respondents complied with that Consent. The orders that recommend themselves, therefore, are as follows:

- a) **The Respondents to comply with the Consent Order of this Court made on 20th January 2015 by allocating to the 411 Applicants any available space on a first serve and priority basis within the next 90 days from the date of this Ruling.**
- b) **The Respondents to file a Report in this Court on its compliance with order (a).**
- c) **The Respondents to pay the cost of this Application.**

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF MARCH, 2022

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.