



**Ogari & 6 others v Ongwae & 3 others (Petition 6 of 2021)  
[2022] KEHC 17150 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17150 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
PETITION 6 OF 2021  
REA OUGO, J  
DECEMBER 21, 2022**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES  
21, 22 AND 23 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE APPLICATION OF THE  
FAIR ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF GOVERNANCE AND MANAGEMENT  
OF URBAN AREAS AND CITIES ACT, NO 3 OF 2011**

**AND**

**IN THE MATTER OF ARTICLE 184 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 87 AND 15 OF THE COUNTY GOVERNMENT ACT, 2012  
IN THE MATTER OF SECTION 20, 21 AND 22 OF THE URBAN AREAS AND CITIES ACT**

**AND**

**IN THE MATTER OF GOVERNANCE AND  
MANAGEMENT OF KISII TOWN MUNICIPALITY**

**AND**

**IN THE MATTER OF LACK OF MUNICIPAL PLANNING MAPS AND PLANS**

**AND**

**IN THE MATTER OF LACK OF PUBLIC PARTICIPATION BY MUNICIPAL BOARD  
IN MAKING MAJOR DECISIONS AFFECTING THE RESIDENTS OF MUNICIPALITY**

**AND**



**IN THE MATTER OF NON-COMPLIANCE OF THE RELEVANT  
LAWS AND PROCEDURES BY KISII MUNICIPAL TO DEMOLISH  
KIOSKS AND MAKESHIFT STALLS WITHIN KISII MUNICIPALITY**

**AND**

**IN THE MATTER OF SUBMISSIONS OF ALL OR ANY APPROVAL  
DOCUMENTS FOR INSTALLATION OF KIOSKS/ MAKESHIFT STALLS**

**AND**

**IN THE MATTER OF ARTICLE 50 (1) (F) AND (G) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE 2ND AND 3RD SCHEDULE  
OF THE URBAN AREAS AND CITIES ACT**

**AND**

**IN THE MATTER OF DEMOLITION OF ALL KIOSKS WITHIN KISII MUNICIPALITY  
VIDE OFFICE OF THE MUNICIPAL MANAGER'S 7 DY NOTICE DATED 13TH APRIL 2021**

**BETWEEN**

**DAVID OTWORI OGARI ..... 1<sup>ST</sup> PETITIONER**  
**VIOLET KEMUNTO ..... 2<sup>ND</sup> PETITIONER**  
**PHILES NYAKUNDI ..... 3<sup>RD</sup> PETITIONER**  
**KARUS ELECTRONICS ..... 4<sup>TH</sup> PETITIONER**  
**CAROLINE CHWEYA ..... 5<sup>TH</sup> PETITIONER**  
**SAMWEL MORA ..... 6<sup>TH</sup> PETITIONER**  
**LILIAN WANJIRO ..... 7<sup>TH</sup> PETITIONER**

**AND**

**THE GOVERNOR JAMES E.O. ONGWAE GOVERNOR KISII  
COUNTY ..... 1<sup>ST</sup> RESPONDENT**  
**KISII COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**  
**KISII MUNICIPALITY ..... 3<sup>RD</sup> RESPONDENT**  
**NAHASHON ONGERI, MUNICIPAL MANAGER KISII MUNICIPALITY .... 4<sup>TH</sup>  
RESPONDENT**

**JUDGMENT**

1. The petitioners are kiosks and stall operators within Kisii municipality. Every year, they receive invoices from the 2<sup>nd</sup> respondent so that they pay levies, fees and charges for various goods and services as well as payment of rates and single business permits. By March 31, 2021, the petitioners had paid licences and levies for 2021. Despite making the payments for the year 2021, the respondents have destroyed several



kiosks and stalls. The petitioners have each received notices from the respondent that it will demolish their kiosks if they don't comply within 7 days starting April 13, 2021.

2. The petitioners cite the respondent for violation of section 22 and 111 of the *Urban Areas and Cities Act* as well as section 87 part III of the *County Government Act*.
3. It is the petitioner's case that they face the risk of their business premises being demolished by the respondents. The petitioners seek the following orders:
  - a. A declaration that the actions of the respondents by forcefully destroying the traders kiosks, stalls with all the goods inside the kiosks and taking the petitioners monies in terms of single business permits, levies, charges and levies and then demolish the kiosks against which they have received payments is a violation of the residents' rights and same are null and void for all purposes.
  - b. An order of judicial review in the nature of *certiorari* to bring unto this court and quash all the notices, decisions and proceedings made by the Kisii municipality board without public participation and pay any damages that may have been incurred by the residents of the municipality as a result of such decisions.
  - c. Any other further order that this honourable court may find just and expedient to grant in the circumstances.
4. Contemporaneously filed with the petition was a notice of motion dated April 19, 2021. The respondents entered appearance and filed a replying affidavit dated May 17, 2021 in response to the petitioner's application. The respondents also filed a notice of motion dated July 28, 2021. When the application dated April 19, 2021 came up for hearing, the parties by consent agreed to compromise the application of April 19, 2021 and that the parties proceed to the hearing of the petition. The respondents were directed to file their response to the petition within 14 days. The respondents failed to file a response to the petition despite being given an opportunity to do so.
5. The hearing of the petition was dispensed by way of written submissions and both parties have filed their respective submissions. Before I delve into the merits of the petition, the respondents argue that the petition does not meet the threshold of a constitutional petition. They relied on the Supreme Court decision in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR where the court stated:

“Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
6. This court must first determine whether the petition meets the constitutional threshold. It has now been established that a constitutional petition should be pleaded with precision so that the parties can



narrow down the issues. The Court of Appeal in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR the court rendered itself as follows:

“The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp vs Holdsworth* (1876) 3 Ch. D. 637 holds true today:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.”

7. From the heading of the petition, I note that the petitioners claim that Article 50 (1) (f) & (g) and Article 184 (1) of the *Constitution* have been violated. The petitioners in their petition do not demonstrate how the respondents acted in infringement of these provisions. On the contrary, they go in detail on how the respondents were responsible for statutory infractions, more specifically, that the respondent violated section 22 and 111 of the *Urban Areas and Cities Act* as well as section 87 part III of the County Government Act. The statutory infringements highlighted by the petitioners have nothing to do with violation of fundamental rights and freedoms under the bill of rights. The court in *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR held as follows:

69. With the above pronouncements in mind, an examination of the petition filed herein shows that it least satisfies the features for a constitutional petition for violation or infringement of rights and fundamental freedoms. The allegations are on a breach of a statutory provision which has nothing to do with rights and fundamental freedoms under the Bill of Rights.

8. The court in *Zack Kinuthia v Judicial Service Commission; Ngugi Grace Mumbi & 3 others (Interested Parties)* [2020] eKLR observed that:

“30. We note from the petition that other than reproducing the provisions of Articles 2, 3(1), 10, 19, 159(1), 159(2) and 159 2(e) at Part C of the Petition under paragraphs 14, 15, 16, 17, 18, 19 and 20 of the amended petition, there is no specific pleading of the particular breach or threat of breach of any constitutional provision by the Respondent in the conduct of the interviews



and subsequent recommendations for appointment of the Interested Parties as Judges of Appeal.

31. Suffice it to state that a petition like the one before court is determined based on the grounds raised in its support and which grounds ought to demonstrate the particular breach or threat of breach of the Constitution that is complained of.....
35. The cumulative effect of the above is that the Petitioner has failed to disclose how and in what manner, the Respondent has violated or threatened to violate any of the cited provisions of the Constitution. The burden was on the Petitioner to demonstrate the breach or threat thereof, a burden that the Petitioner has failed to discharge. He did not plead at all the provisions infringed by the Respondent and the manner of the alleged infringements.”

9. The petition does not disclose any violation of the petitioner’s rights under the Constitution of Kenya. In the end, I find that the petition does not meet the threshold of a constitutional petition as it fails to disclose any violation of the Constitution and the manner in which they were violated. The petition is hereby dismissed. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT ONLINE VIA MICROSOFT TEAMS THIS 21<sup>ST</sup> DAY OF DECEMBER, 2022.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Sagwe for the Petitioners**

**Mr. Ongiti for the Respondents**

**Ms Wilkister C/A**

