



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 58 OF 2020**

**THE LAW SOCIETY OF KENYA.....PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS**

**AND PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS**

**AND PHYSICAL PLANNING.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioner, the Law Society of Kenya, brought the petition dated 21<sup>st</sup> February, 2020 under Articles 2, 10, 22, 33, 34, 40, 47 and 259 of Constitution and Rules 11, 12, 13 and 20 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. The petition is supported by the affidavit of Mercy Wambua, who is the Secretary/Chief Executive Officer of the Petitioner.
2. The Attorney General; the Principal Secretary of the Ministry of Lands and Physical Planning; and the Cabinet Secretary of Ministry of Lands and Physical Planning are the respective 1<sup>st</sup> to 3<sup>rd</sup> respondents.
3. The Petitioner's case is that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents published a public notice in the Daily Nation and the Standard newspapers on 20<sup>th</sup> February, 2020 indicating that the Nairobi District and Central Registries at Ardhi House would be closed for three weeks from 24<sup>th</sup> February, 2020 to 13<sup>th</sup> March, 2020 for purposes of audit of records.
4. The Petitioner states that the decision of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was taken without observing the law and principles of natural justice. The Petitioner contends that the public was not given sufficient or reasonable notice of how the closure would affect ongoing land transactions; that the decision was not backed by the law; that the decision was reached unilaterally; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted *ultra vires* as there are no regulations pertaining to the closure of registries; and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted in bad faith and abuse of their powers as they acted without substantive fairness and regard to the principles applicable in the decision-making process.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are also alleged to have violated the legitimate expectation that they would adhere to the regulations governing the conduct of their business, the requirement for public participation, and the rules of natural justice. The Petitioner argues that the closure of the land registries undermines the legal rights generally and interferes with the statutory timelines for registration of instruments under the Land Registration Act, 2012 and the Companies Act, 2015. Further, that it interferes with the statutory timelines for stamping of instruments under the Stamp Duty Act. It is also averred that the closure of the registries undermines legal rights generally.
6. The Petitioner asserts that the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have also jeopardized the transactions under which undertakings have been issued by advocates and financial institutions by delaying the completion of the transactions. Moreover, that the closure will likely result in frustration of various contracts where obligations of parties are tied to timelines dependant on functions of the land registries.
7. The Petitioner avers that the National Assembly was petitioned on 21<sup>st</sup> January, 2020 to investigate the massive failure of the 'land information management system' in which the 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed *inter alia* to follow proper procedure for the approval of the

**Land Registration (Electronic Land Transaction) Regulations, 2019** by the National Assembly. The Petitioner fears that loss or misplacement of records will occur during the audit.

8. The Petitioner avers that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have acted without any legal basis, have not followed the due process of law, and are in disregard of Article 40 of the Constitution and the provisions of Part VIII of the Land Act, 2012 and the Land Registration Act, 2012.

9. The Petitioner therefore prays for orders that:

**a) An Order of Certiorari to remove and bring to this Honourable Court and quash the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' decision communicated in the Daily Nation and The Standard newspapers of 20<sup>th</sup> February 2020 on the temporary closure of Nairobi District and Central Registries (At Ardhi House) for auditing of records.**

**b) An Order of Mandamus directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to only issue such notices of closure upon ensuring that there is public participation and after the National Assembly has reviewed and given findings to the Petition by the Petitioner lodged on 22<sup>nd</sup> January 2020.**

**c) A Declaration that the actions and decisions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in respect of the purported directions and decision contained in the notice published in the Daily Nation and The Standard newspapers on 20<sup>th</sup> February 2020 and the temporary closure of Nairobi District and Central Registries (At Ardhi House) for auditing of records are null, void and unconstitutional.**

**d) A Declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents violated Chapter 6 and Article 10 of the Constitution in publishing the notice in the Daily Nation and The Standard newspapers on 20<sup>th</sup> February 2020 on the temporary closure of Nairobi and Central Registries (At Ardhi House) for auditing of records without public participation and with no legal framework.**

10. The respondents filed a joint replying affidavit sworn on 3<sup>rd</sup> March, 2020 by Dr Nicholas Muraguri, the Principal Secretary in the Ministry of Lands and Physical Planning.

11. Dr Muraguri deposed that pursuant to Section 36 of the Land Registration Act, 2012 it is the statutory function of the respondents to ensure that there is efficiency in its registries across the country and that the public is able to receive seamless services.

12. The Principal Secretary averred that the notice in the newspapers disclosed that the registries in question were open for dealing with urgent documents; that all documents pending dispatch were to be sent by the registries to the respective clients; and that during the period of closure any emergencies were to be handled by the customer care centre at the ground floor of Ardhi House. It is deposed that it would therefore be factually misleading to state that during the audit period the registries in question were to be closed and the services ordinarily rendered by the respondents at the registries deferred.

13. It is additionally averred that the petition did not allude to the notice of 21<sup>st</sup> February, 2020 and neither was the same availed to the Court. It is thus averred that some averments in the petition are not based on facts but conjecture, apprehensions and speculation and that the apprehensions forming the basis of the petition were cured by the notice dated 21<sup>st</sup> February, 2020.

14. It is deposed that since 2017 the respondents had several stakeholder meetings with the Petitioner on various issues affecting service delivery, which subsequently informed the intended partial closure of the registries for an audit.

15. It is the respondents' case that the limited closure of the registries in question did not infringe in any way the rights of the Petitioner under Article 40 of the Constitution and Part VIII of the Land Act, 2012. It is their contention that the notice did not affect anybody's proprietary rights and the allegations of the infringement of the above provisions lack specificity and therefore cannot be responded to.

16. The Petitioner filed written submissions dated 4<sup>th</sup> March, 2020 in support of the petition. The Petitioner submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not facilitate public participation, which is a mandatory requirement under Article 10 of the Constitution, prior to the closure of the Nairobi and Central registries.

17. It is submitted that the respondents are under an obligation to ensure prior issuance of closure notice, that the members of the public have been sufficiently involved, that information is provided on how the process will be conducted, and information should be availed on the safety of the system in terms of the validity of titles and all land documents. This constitutional imperative for public participation is buttressed by reference to the decision of the Court of Appeal in **Kiambu County Government & 3 others v Robert N. Gakuru & others [2017] eKLR**.

18. The respondents did not file any submissions. However, it was averred in their replying affidavit that since 2017 the respondents have had several stakeholder meetings with the Petitioner on various issues affecting service delivery, which subsequently informed the intended partial closure of the registries for an audit.

19. I am in agreement with the Petitioner that Chapter Six of the Constitution and in particular Article 73 should be read together with Article 10, as they illustrate the manner in which State officers and public servants should exercise their authority when making or implementing public policies and conducting their day to day operations. State officers are bound to exercise their authority in a manner that, *inter alia*, demonstrates respect for the people and promote public confidence in the integrity of their offices.

20. The question is whether the impugned notice of 20<sup>th</sup> February, 2020 violated Article 10 and Chapter Six of the Constitution. The effect of the said notice was to completely shut down all the operations of both the Nairobi and Central registries including the records registry and the banking hall for the duration of the closure which was to commence on 24<sup>th</sup> February, 2020 and end on 13<sup>th</sup> March, 2020. The notice was, however, suspended through an order issued by this Court on 24<sup>th</sup> February, 2020. The first prayer in the petition has therefore been overtaken by events.

21. Nevertheless, the notice dated 20<sup>th</sup> February, 2020 must be read together with the notice dated 21<sup>st</sup> February, 2020 annexed to the replying affidavit of the 2<sup>nd</sup> Respondent. The second notice clarified that the registries in question were open in respect of urgent documents including court orders, bank charges and discharges; that all documents that were pending dispatch were to be sent by the registries to the respective customers; and that a customer care desk was available at Arthi House to deal with any emergencies during the closure period.

22. The Petitioner claims that the notice of 20<sup>th</sup> February, 2020 violated Article 10 and Chapter Six of the Constitution. I agree that the notice gave no alternative to persons who may have been faced with urgent matters requiring services from the registries during the closure period. This position was nevertheless softened by the notice of 21<sup>st</sup> February, 2020.

23. The requirement that public bodies should embrace public participation in their activities must be tempered with realism and reasonableness. In **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR**, the Court of Appeal stated that:

**“47. We believe that the 1<sup>st</sup> respondent facilitated the public participation of the relevant stakeholders being the tenants in the suit estates through their representative, the 1<sup>st</sup> interested party. Besides, the 1<sup>st</sup> respondent also facilitated reasonable opportunity to other residents of Mombasa County, the general public at large and civil society to participate by holding press conferences, briefing members of public and establishing a department to exclusively deal with concerns regarding the project. In the end, we find that the appellants’ allegation that the respondents did not facilitate adequate public participation goes against the weight of the evidence summed up hereinabove. Confronted with this state of affairs and the submission by Mr Amoko that indeed public participation was still ongoing and that the 1<sup>st</sup> respondent was continuously appraising the tenants and other interested parties on the progression of the project, Mr Oluga conceded that their disenchantment was not with the current position but with the fact that his clients were not involved when the idea to come up with the project was actually conceptualised.**

**48. In our view however, this argument is tantamount to requiring public participation in the County government’s thought process. One cannot be expected to invite members of public to participate in an intangible thought or an innate concept before the same has crystallised into an implementable concept particularly when the concept in question is a novel one that is being conceptualised for the first time as in this case. That in our view would be surreal, unrealistic and unworkable. We are satisfied that there was extensive public participation in this matter and the learned Judge did not err in so finding.”**

24. I don’t think that a public agency intending to close its offices for a short period of time should invite the views of the public before effecting the decision. The notice of closure and contacts of persons to be reached in case of need for urgent service is sufficient. This is what the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did and there is nothing unconstitutional in their actions. After all the closure was meant to improve the services that were to be offered to the members of the public. Public participation should be a facilitator and not an impediment to the public good.

25. There was the un rebutted averment by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the Petitioner had all along been involved in searching for a better way of delivering services to the public. It is not like the decision to close the registries was arrived at without the involvement of the Petitioner and members of the public. The concept of public participation should not be used as a roadblock to the delivery of services.

26. The Petitioner has not explained how other rights or constitutional provisions were violated by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Indeed, if there was any violation, then the same was remedied upon the issuance of the conservatory order suspending the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ decision. No further remedies are therefore deserved in this matter.

27. It is additionally noted that some of the prayers sought in the petition cannot be granted. An example is the prayer for an order of mandamus directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to only issue such notices of closure after the National Assembly has reviewed and given findings in respect of a petition lodged by the Petitioner on 22<sup>nd</sup> January, 2020. The operations of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should not depend on the operations of other public bodies.

28. In summary, I find the petition herein to be without merit. The petition is therefore dismissed. The parties will bear their costs of the proceedings.

**Dated, signed and delivered virtually at Nairobi this 25<sup>th</sup> day of February, 2021**

**W. Korir,**

**Judge of the High Court**