



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 8 OF 2020

IN THE MATTER OF: ARTICLE 1, 2 (4), 10, 21, 22, 23, 27, 28, 35, 47, 118, AND 174 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF: VIOLATION OF ARTICLES 10, 27, 47, 35, 118 AND 174 OF THE CONSTITUTION AND THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012 BY THE COUNTY GOVERNMENT OF MOMBASA

-AND-

IN THE MATTER OF: REFUSAL BY THE COUNTY GOVERNMENT OF MOMBASA TO ALLOW MEMBERS OF CAR IMPORTERS ASSOCIATION OF KENYA MOMBASA FROM RENEWING TRADE LICENCES TO CARRY ON BUSINESS OF SELLING IMPORTED SECOND HAND MOTOR VEHICLES WITHIN THE CENTRAL BUSINESS DISTRICT MOMBASA AND ITS ENVIRONS

-AND-

IN THE MATTER OF: THE POLICY BY THE COUNTY GOVERNMENT OF MOMBASA TO RELOCATE ALL IMPORTED SECOND HAND CAR DEALERS TO MIRITINI AREA NEAR THE STANDARD GAUGE RAILWAY (SGR) MOMBASA TERMINAS FOR THE SAID IMPORTERS TO CARRY THEIR BUSINESSES OF SELLING SECOND HAND MOTOR VEHICLES THEREAT

-AND-

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION AND FAILURE BY THE RESPONDENT TO INVOLVE THE RELEVANT STAKEHOLDERS BEFORE COMING UP WITH THE POLICY TO RELOCATE ALL IMPORTED SECOND HAND CAR DEALERS TO MIRITINI AREA NEAR THE STANDARD GAUGE RAILWAY (SGR) MOMBASA TERMINAS FOR THE SAID IMPORTERS TO CARRY THEIR BUSINESSES OF SELLING SECOND HAND MOTOR VEHICLES THEREAT

-BETWEEN-

CAR IMPORTERS ASSOCIATION OF KENYA.....PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

JUDGMENT

Parties

1. The Petitioner is a duly registered association of car importers of Kenya having its registered offices within the Republic of Kenya.
2. The Respondent is the County Government of Mombasa charged with the duty of running the regional government and administrative affairs in Mombasa County.

The Petition

3. The Petitioner filed an Amended Petition dated 16/6/2020 stating that they have been operating in Mombasa Central Business District at all material times, and therefore, they have a legitimate expectation that the respondent will involve them in case the respondent wished to relocate its members to Miritini area. Consequently, the petitioner is challenging the many public declarations by the Respondent stating that it will relocate the members of the petitioner from the Mombasa Central Business District to Miritini area near the Standard Gauge Railway (SGR) Mombasa Terminus.
4. The Petitioner states that the said decision made through various public declarations will adversely affect its members, as their business is fundamentally reliant on large cash transactions. Consequently, to avoid cases of theft, and other acts of insecurity, the said businesses must, of necessity, be carried out in an area that is well served by banks, and Mombasa Central Business District passes that test; while Miritini fails that test. Further, the existence of garages in the Mombasa Central Business District to take care of the repair needs of imported second hand cars makes relocation to Miritini unrealistic since there exists no requisite infrastructure in the Miritini Area to sustain the business operations relating to the selling of second hand motor vehicles and the area is highly deserted with no business activities going on.
5. It is the Petitioner's case that there has been open discrimination by the Respondent against its members viz-a- viz its competitors who are household motor vehicle dealers such as CMC well known for Volkswagens' and Range Rovers, DT Dobie for Mercedes Benz, Toyota Kenya Limited for Toyota Vehicle and so forth. The said entities have however not been affected by the said relocation policy and have been able to access the Respondent's electronic licensing system to which the petitioner's members have been denied access.
6. It is the Petitioner's case that in a bid to arm-twist the members of the Petitioner's association into moving to Miritini area, from January 2019, the Respondent unreasonably shut out 75 members of the Petitioner's association from accessing the online electronic licensing system. Members of the Petitioner's association were not given an opportunity to respond to the issues of denial of trading licences and no reasons were given for the denial of the said licences. However, the Respondent resorted to harassing members of the Petitioner's association through preferring charges against them for trading without a trade licence yet the Respondent is the author of their misfortune.
7. The Petitioner states that there does not exist the requisite infrastructure in the Miritini area to sustain the business operations that relate to the selling of second hand motor vehicles and the safety of the owners thereof would be highly prejudiced because as the saying goes: **there is security in numbers**, which would be lost when the members of the Petitioner are pushed to the Miritini area that is highly deserted and where there is rarely little or no business activities going on.
8. It is the Petitioner's case that since its members have been operating in Mombasa Central Business District at all material times, they had a legitimate expectation that the Respondent will involve them in case the Respondent wished to relocate the Petitioner's members to Miritini area. Even though the Respondent is yet to communicate a formal decision for the relocation of the Petitioner's members' businesses, the Respondent has not made any statement to disown and/or rebut the contents made in public declaration that it will relocate the Petitioner's members.
9. The Petitioner states that it had filed Mombasa High Court Judicial Review Application No. 47 of 2019 over the same subject matter but it has since withdrawn the same. The said Judicial Review Application was yet to be heard and determine. As such, the issue of *res-judica* cannot arise herein.
10. The Petitioner states that the Respondent has violated and/or has threatened to violate their constitutional rights under Article 35 of the Constitution by communicating the planned decision to relocate the members of the Petitioner from Mombasa Central Business District via public declarations instead of formally communicating the said decision directly to members of the Petitioner. The Petitioner further states that the Respondent has violated Articles 1(1),10, 47, 118 and 174 of the Constitution by failing to Act in an accountable and transparent manner and failing to give the Petitioner who is affect by the decision, a right to participate in the decision to relocate them from the Mombasa Central Business district.
11. The Petitioner states that its members' rights to work and earn a living guaranteed under Article 41 and 43 of the Constitution have been violated by the Respondent's acts of denying the trading licences and arresting them by virtue of lack of the said licences.
12. For the forgoing reasons, the Petitioner prays for the following orders:
- a) A declaration that the Petitioner's members have a right to be directly informed of the decision leading to their relocation from the Mombasa central business district to Miritini area near the Standard Gauge Railway (SGR) Mombasa Terminus.**
 - b) A declaration that the Petitioner's members have a right to be involved in the decision making process leading to their relocation from the Mombasa central business district to Miritini area near the Standard Gauge Railway (SGR) Mombasa Terminus.**
 - c) A declaration that the intended relocation of the Petitioner's members from the Mombasa central business district to Miritini area near the Standard Gauge Railway (SGR) Mombasa Terminus without giving them a chance to be heard in the manner in which the said decision was arrived at is in violation of Articles 10, 47, 118 and 174 of the Constitution of Kenya, 2010.**
 - d) A declaration that the Respondent's failure to configure its electronic licensing system so as to allow members of the Petitioner's association to access the said system so as to apply and thereby obtain the annual trade licences is in violation of Articles 10, 27, 43 and 47 of the Constitution of Kenya, 2010.**
 - e) An order directing the Respondent to configure its electronic licensing system so as to allow members of the Petitioner's association, to wit, Gede Enterprises Limited, Kenya Malik Motors, Pirzada Motors Company Ltd, Zeni Motors Limited, Choudhry Motors Limited, Sitara Trading Company Ltd, RZ Motors (K) Limited, Aman Cars and General Ltd, Mombasa Car Park Limited, Fuji King Motors Ltd, Yuasa Motors Ltd, Nobel Trading Ltd, Punjab Trading Co. Ltd, Sleek Trading Limited,**

Auto Japan (Mombasa) Ltd, Carworld Kenya Ltd, Interdunia Mombasa Limited, Wazir Auto Limited, Apex Japan Limited, Al-Siddique Motors Limited, Malik Boek Co. Ltd, Citi Motors Ltd, Sealand Motors Ltd, Impact East Africa Ltd, Hina Trading Limited, Hira Trading Limited, Rana Auto Selection Limited, Vanna Limited, Alibaba Motors Limited, Khilji Enterprises Ltd, Cosmos Cars Ltd, Zest Automobile Limited, Lakhan Motors Ltd, Meezan Motors Ltd, Darson Trading Ltd, Ayan Automobiles Ltd, Azan Motors Ltd, Moiz Motors Ltd, Gorgeous Trading Co. Ltd, Bell Motors (K) Ltd, Auto Cats International Ltd, Al-Alyaan Motors Ltd, Al-Fadhl Motors Ltd, Qasim & Yahya Ltd, Shahzad Motors Ltd, Osaka Motors Kenya Ltd, Fahari Cars Ltd, Al-Ginza Automobiles Ltd, Avenue Motors Ltd, Mussab Motors Ltd Taskys, Taj Ventures Limited, Nafas World Auto (K) Ltd, Ken-Bangla Motors (E.A) Ltd, Rehmaan Trading Ltd, Fortune Automobile Company Ltd, Bolpak Trading Co. Ltd, Tatla Motors Ltd, Liberty Motors Ltd, Sekai Cars Sales Limited, Lizaz Enterprises Ltd, Radha Motors Limited, Yahya Car Sales (K) Ltd, Kayani Motors Limited, Niigata Motors Limited, Ramna International Motors Co. Ltd, Al-Husnain Motors Ltd, Mirza & Company International Ltd, Bhinder Corporation Ltd and Aisha Auto Kenya Limited to access the said system so as to apply and thereby obtain the annual trade licences issued by the Respondent for all businesses carried out in the Respondent's jurisdiction.

f) A permanent injunction restraining the Respondent from interfering with Petitioner's members business, to wit, Gede Enterprises Limited, Kenya Malik Motors, Pirzada Motors Company Ltd, Zeni Motors Limited, Choudhry Motors Limited, Sitara Trading Company Ltd, RZ Motors (K) Limited, Aman Cars and General Ltd, Mombasa Car Park Limited, Fuji King Motors Ltd, Yuasa Motors Ltd, Nobel Trading Ltd, Punjab Trading Co. Ltd, Sleek Trading Limited, Auto Japan (Mombasa) Ltd, Carworld Kenya Ltd, Interdunia Mombasa Limited, Wazir Auto Limited, Apex Japan Limited, Al-Siddique Motors Limited, Malik Boek Co. Ltd, Citi Motors Ltd, Sealand Motors Ltd, Impact East Africa Ltd, Hina Trading Limited, Hira Trading Limited, Rana Auto Selection Limited, Vanna Limited, Alibaba Motors Limited, Khilji Enterprises Ltd, Cosmos Cars Ltd, Zest Automobile Limited, Lakhan Motors Ltd, Meezan Motors Ltd, Darson Trading Ltd, Ayan Automobiles Ltd, Azan Motors Ltd, Moiz Motors Ltd, Gorgeous Trading Co. Ltd, Bell Motors (K) Ltd, Auto Cats International Ltd, Al-Alyaan Motors Ltd, Al-Fadhl Motors Ltd, Qasim & Yahya Ltd, Shahzad Motors Ltd, Osaka Motors Kenya Ltd, Fahari Cars Ltd, Al-Ginza Automobiles Ltd, Avenue Motors Ltd, Mussab Motors Ltd Taskys, Taj Ventures Limited, Nafas World Auto (K) Ltd, Ken-Bangla Motors (E.A) Ltd, Rehmaan Trading Ltd, Fortune Automobile Company Ltd, Bolpak Trading Co. Ltd, Tatla Motors Ltd, Liberty Motors Ltd, Sekai Cars Sales Limited, Lizaz Enterprises Ltd, Radha Motors Limited, Yahya Car Sales (K) Ltd, Kayani Motors Limited, Niigata Motors Limited, Ramna International Motors Co. Ltd, Al-Husnain Motors Ltd, Mirza & Company International Ltd, Bhinder Corporation Ltd and Aisha Auto Kenya Limited until the Respondent configures its electronic licensing system so as to allow members of the Petitioner's association them to access the said system so as to apply and thereby obtain the annual trade licences.

g) The costs of the petition.

h) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

13. The Petition is supported by the affidavit sworn on 16/1/2020 by **Peter Otieno** who is the Petitioner's National Chairman.

The Respondent's case

14. In response to the Amended Petition, the Respondent filed Grounds of Opposition dated 7/7/2020 raising the grounds summarized herein as follows:

a) The Petition is imaginary and does not disclose any reasonable cause of action

b) The Petitioners are using the Court process to challenge an administrative procedure.

c) The purported dispute is yet to crystalize as admitted by the Petitioner.

d) The Application is frivolous and should be dismissed for being an abuse of the Court process.

Submissions

15. **Mr. Gikandi** learned counsel for the Petitioner in support of the Amended Petition reiterated the contents of Supporting Affidavit aforesaid. **Mr. Gikandi** identified three issues for determination by this Court as follows:

(i) Whether the decision to deny the Petitioner's members business permits is in violation of the Petitioner's right to fair administrative action under Article 10, 27, 43, and 47 of the Constitution;

(ii) Whether the Respondent has made a decision to relocate the members of the Petitioner from the Mombasa central business district to Miritini area near the Standard Gauge Railway (SGR) Mombasa Terminus;

(iii) Whether the decision to relocate the members of the Petitioner from the Mombasa central business district to Miritini area near the Standard Gauge Railway (SGR) Mombasa Terminus is in violation of the Petitioner's right to fair administrative action under Article 10, 47, 118, and 174 of the Constitution.

16. Counsel submitted that the Respondent has not controverted that the members of the Petitioner's association were shut out from online electronic licensing system for the year 2019 yet they had previously been issued with business permits for the year 2018. Consequently, the Respondent's decision is void for failing to give the Petitioner's members an opportunity to be heard before denying them the licences. Counsel cited the finding in *Kiai Mbaki & 2 others v. Gichuhi Macharia & another [2005]* eKLR where the Court of Appeal held that a

party should not be deprived of his right to be heard if the rights of the opposing party would not be prejudiced.

17. **Mr. Gikandi** submitted that since the Respondent has not controverted and/or rebutted the facts that there have been public declarations of the Respondent's intention to relocate members of the Petitioner's association from the Mombasa Central Business District through an Affidavit, the said allegations remain true. **Mr. Gikandi** referred the Court to **David Katana Ngomba v. Shafi Grewal Kaka [2014] eKLR** where the Court of Appeal held that it is a cardinal rule of evidence that where a party fails to call a critical witness, the Court is free to draw an inference that the witness if called would have given adverse evidence against the party who failed to call the witness.

18. Counsel further submitted that a party needed not wait for a violation of a right or a contravention of the constitution to occur before approaching Court for a relief. Therefore, the intention to relocate the Petitioner's members is unlawful and in contravention of the constitution for want of public participation since the views of the Petitioner's members were not obtained before the unilateral public declaration to relocate the Petitioner's members was made.

19. **Ms. Kisingo** learned counsel for the Respondent relied on the Respondent's Grounds of Opposition and submitted that the Petitioner ought to have challenged the Respondent's administrative decision by way of Judicial Review. Therefore, the instant Petition is an abuse of the Court process.

20. **Ms. Kisingo** submitted that the Petitioner had been ordered to relocate to Miritini as early as the year 2014 and the said decision was never challenged. After some negotiations, the Petitioners were allowed to renew their licences and they continued operating their businesses in Mombasa Central Business District. Now that the Respondent has refused to allow renewal of the licences belonging to member of the Petitioner, this Petition has been filed in an attempt to hoodwink this Court to assist the Petitioner to continue operating illegally within the Mombasa Central Business District.

21. In rejoinder, **Mr. Gikandi** submitted that the Respondent having failed to file a Replying Affidavit to the Petition, it ought not to be allowed to introduce new issues via submission.

Determination

22. I have considered the Petition and rival submissions, together with authorities relied on by both parties. In my view, the issue arising for determination are as follows:

a) Whether the Petitioner's case is controverted.

b) Whether the Petition has proved violation of her rights by the Respondent.

c) What reliefs are available to the Petitioner

a) Whether the Petitioner's case is controverted

23. It is noteworthy that the Respondent never filed any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioner that the 1st Respondent's through public declaration had directed that members of the Petitioner's organisation be relocated from the Mombasa Central Business District to Miritini, and that following the aforesaid public declarations, 75 Members of the Petitioner's association were locked out of the Respondent's online electronic licencing system, which meant that they could not apply for renewal of their trade licence for the year 2019. The Petitioner further avers that the Respondent's decision was made without giving them an opportunity to make a representation on the issue of relocation of their business from Mombasa Central Business District to Miritini, yet the said decision was bound to affect their livelihood and businesses. Consequently, there was no public participation before the relocation policy was formulated.

24. It was also the Petitioner's case that the Respondent's relocation policy was discriminatory since it did not affect their competitors who are household motor vehicle dealers such as CMC well known for Volkswagens' and Range Rovers, DT Dobie for Mercedes Benz, Toyota Kenya Limited for Toyota Vehicle and so forth. These Motor Vehicles dealers were allowed to remain in the Mombasa Central Business District, and they were allowed to access the Respondent's electronic licensing system.

25. It is the Petitioner's case and rightfully so in this Court's view, that the Grounds of Opposition that were filed by the Respondent are deemed to address issues of law; the said grounds of opposition are general averments and cannot amount to a proper or valid denial of allegations made on oath. See **Peter O. Nyakundi & 68 others vs. Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR** where Odero J, addressing a claim where the Attorney General as the Respondent failed to file a Replying Affidavit stated:

"As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition, which were filed, are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see MEREKA & CO. ADVOCATES Vs UNESCO CO. LTD 2015 eKLR, PROF OLAKA ONYANGO & 10 OTHERS Vs HON. ATTORNEY GENERAL CONSTITUTION PETITION NO. 8 OF 2014 and ELIUD NYAUMA OMWOYO & 2 OTHERS -Vs KENYATTA UNIVERSITY). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence."

26. Similarly, in **Phillip Tirop Kitur vs. Attorney General [2018] eKLR**, the Court accepted the affidavit evidence, and ruled that in the

absence of a replying affidavit or oral evidence from the Attorney General, the Petitioner's evidence stood unchallenged. In addition, the High Court rejected the Attorney General's contention that the delay in filing the Petition had caused it prejudice, ruling that in the absence of a Replying Affidavit or oral evidence, the Court had no facts upon which it could make such a finding. Therefore, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the Petitioner's claims? The above question will be answered in the next issue.

b) ***Whether the Petitioner has proved his case to the required standard.***

27. The Petitioner states that the Respondent has in many public declarations directed that it will relocate the members of the Petitioner from the Mombasa Central Business District to Miritini area near the Standard Gauge Railway. There is a clear threat to their fundamental rights and freedoms since the aforesaid public declarations, when eventually actualized, will adversely affect the Petitioner's members' businesses

28. Under Article 22, the Constitution gives every person the right to

"...institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened".

Article 258 uses similar language, giving to every person the right to

"...institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention."

29. The Court of Appeal in ***Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR*** stated as follows: -

"... We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the Constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat."

30. In ***Christian Juma Wabwire vs. Attorney General [2019] eKLR, the Judge relied on the decision in Lt. Col Peter Ngari Kagume and 7 others vs. AG, Constitutional Application No. 128 of 2006*** it was held that: -

"23. [I]t is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the Court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the Court is dead to speculation and imaginations and must be guided by evidence of probative value. When the Court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation..."

31. The Petitioner has made many allegations relating to the Respondent's public declarations on relocation policy that requires members of the Petitioner's association to move to Miritini: Unfortunately, little evidence was provided to substantiate the allegations, except evidence heavily gleaned from Newspaper cuttings. In the case of ***Andrew Omtata Okoiti & 5 Others vs. Attorney General & 2 others [2010] eKLR*** the Court held as follows: -

"This case however, can hardly go far because the petitioners have solely relied on newspaper cuttings in discharging their evidentiary burden which approach is rather flawed. The probative value of such cuttings is not in line with the requirements of the Evidence Act and most importantly, their probative value points to the direction of hearsay, which then impugns their admissibility. Without diluting the existing principles on the discharge of evidentiary burden, an allegation of such weight cannot be founded on opinion pieces written by authors who most likely sourced their information from 3rd parties."

32. However, in the opinion of this court, the Respondent's intention, in the absence of a properly convened public meeting, will most likely be given expression through newspapers. Further, the petitioner herein is apprehensive of such intention on the part of the Respondent. And the Respondent has not done anything to assuage the Petitioner's worries. The petitioner is therefore entitled to rely on newspaper pronouncements. And where such pronouncements have not been controverted, as in this case, in an affidavit, their probative value is higher, and this court is prepared and hereby accepts as credible such evidence. In any event, the issue of newspaper reports is not isolated. It is intertwined with other issues raised in the Petition, including the allegation that Petitioner's members are being harassed and charged in Court. Orders issued by the County Court on 15/4/2019 in ***Criminal Case No. M 2560 of 2019*** and ***Criminal Case No. M 2562 of 2019*** were annexed in the Petitioner's Supporting Affidavit, in proof of such harassment and charges. This Court is satisfied that the Petitioner's members are being harassed by the Respondent for trading without a licence, and this fact, in large part, substantiates the Petitioner's allegations of the intended relocation.

33. On the issue of Respondent configuring its electronic licensing system to shut out members of the Petitioner's association, the Petitioner produced seventy five (75) copies of certificates by its members who took out single business permit for the year 2018 that expired on the 31/12/2018. The petitioner in its supporting affidavit annexed a letter dated 29/3/2019, which was addressed to the Respondent's C.E.C.M Trade, Tourism and Investment and the Respondent received the said letter on 1/4/2019. In the said letter, which is Referenced" ***REFUSAL TO RENEW SINGLE BUSINESS PERMITS FOR USED CARS DEALERS WITHIN THE MOMBASA ISLAND FOR THE YEAR 2019***" the petitioner states as follows:

"... due to this all our members have been unable to renew their single business Permit for this year for reasons that the

County Government is unwilling to renew them for reasons which have not been disclosed or explained to us.

We are now calling upon you as the county Executive Committee Member for Trade, Tourism and Investment to kindly intervene, as all our members are ready and willing to comply with any directives given by the County Government regarding the renewal instructions as they have always done in the past..."

34. As previously mentioned, the Respondent did not file a Replying Affidavit to controvert the issues of facts raised in the Petition. Consequently, this Court finds and holds that there has been a violation of the Petitioner's Rights guaranteed under Article 47 of the Constitution and that the Respondent has not adhered to the provisions of Articles 10 of the Constitution. Article 47 stipulates as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

35. Additionally, Section 4 (3) and (4) of the Fair Administrative Action Act, which was enacted to implement Article 47, lays down the procedure to be adopted by Public Officers when taking administrative actions, as follows:

"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."

36. Section 12 of The Act provides that:

"The act is in addition to and not in derogation from the general principles of common law and the rules of natural justice."

37. In *Onyango Oloo vs. Attorney General [1986-1989] EA 456* the Court of Appeal expressed itself as follows:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings..."

38. From the foregoing, this Court finds and holds that the Respondent failed to comply with Article 47 of the Constitution, and with provisions of the Fair Administrative Act in arriving at the impugned decision. This Court further finds and holds that the Petitioner is entitled to take proactive actions to prevent abrogation of a right or a fundamental freedom as stipulated in Article 22 and 258 of the

Constitution, and that the Petitioner did not have to wait for the threatened violations to take place before taking a legal action herein to restrain the same.

39. In the upshot, this Court finds and holds that the Petition herein is merited, and that the same has been proved on a balance of probabilities. The Petition is allowed as follows:

(i) A declaration that the Respondent has acted in a manner likely to threaten the rights and fundamental freedoms of the Petitioner's members by failure to involve the Petitioner in a decision likely to negatively affect their rights.

(ii) A declaration that the Respondent's failure to configure its electronic licensing system so as to allow members of the Petitioner's association to access the said system so as to apply and thereby obtain the annual trade licences is in violation of Articles 10, 27, 43 and 47 of the Constitution of Kenya, 2010.

(iii) The Respondent is hereby ordered and directed to configure its electronic system so as to allow members of the Petitioner's association identified at prayer (e) of the Petition to apply and obtain the relevant trade licences issued by the Respondent for all businesses carried out in the Respondent's jurisdiction.

(iv) A declaration is hereby made that whereas the Respondent has constitutional and statutory duties to plan the City of Mombasa, and whereas the Respondent has the mandate to relocate the Petitioner's members from the Mombasa Central Business District to any other place within the City of Mombasa, such policy plans, measures and actions leading to the making of such decision must be participatory, public driven through public participation and in accordance with constitutional values and principles. Until such a time that the said public participation has been done, the Petitioner's members identified in prayers (e) and (f) herein cannot be evicted, removed, or relocated from the Mombasa Central Business District.

(v) Each party to bear own costs of the Petition,

DATED, SIGNED & DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Ms. Murage for Petitioner

Ms. Kisingo for Respondent

Ms. Peris Court Assistant