



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONST. PETITION NO. E005 OF 2021

JOSEPH OMONDI OCHIENG.....1ST PETITIONER

MAURICE JUMA.....2ND PETITIONER

LUKE OCHOLLA.....3RD PETITIONER

WILLIAM ODUOR.....4TH PETITIONER

SILAS OWITI.....5TH PETITIONER

*(Suing on their own behalf and on behalf of the membership of **CHOPPIES ROUNDABOUT BODABODA YOUTH GROUP, TUFFOAM MALL BODABODA RIDERS SELF HELP GROUP** and all other affected owners of boda boda, tuk tuk, taxis, private vehicles and traders within the city center and more specifically Oginga Odinga and Angawa Streets of **KISUMU CITY Central Business District (CBD) IN KISUMU COUNTY**).*

VERSUS

CITY MANAGER – KISUMU.....1ST RESPONDENT

KISUMU CITY BOARD.....2ND RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....3RD RESPONDENT

JUDGMENT

The six Petitioners, **JOSEPH OMONDI OCHIENG; MAURICE JUMA; LUKE OCHOLLA; WILLIAM ODUOR; SILAS OWITI and VINCENT OTIENO** have lodged the Constitutional Petition herein on their own behalf and on behalf of the membership of **CHOPPIES ROUNDABOUT BODA BODA YOUTH; TUFFOAM MALL BODA BODA RIDERS SELF HELP GROUP**, and *“all other affected owners of boda bodas, tuk tuks, taxis, private vehicles andtraders within the City Centre and more specifically Oginga Odinga and Angawa Streets of **KISUMU CITY Central Business District (CBD) IN KISUMU COUNTY**.”*

1. It was the Petitioners’ case that the petition herein was instituted in public interest and the *“class interest of citizens”* who had been affected by the arbitrary forceful eviction of;

“..... their motor vehicles from parking in the affected areas pursuant to the public notice dated 19/01/2021 and effective on 22/02/2021.”

2. The petition is premised on, inter alia, the following facts, set out on the face thereof;

“1) THE Petitioners are the project affected citizens who are in the business of boda bodas, tuk tuks, taxis, private vehicles and

traders within the city centre and more specifically Oginga Odinga and Angawa Streets of KISUMU CITY Central Business District (CBD) in KISUMU COUNTY and who have been affected as a class, by the respondents method of arbitrary forceful eviction of their motor vehicles from parking in the affected areas and also outlawed from trading thereon pursuant to the public notice dated 19/02/2021 and effective 22/02/2021.”

3. From those facts it is evident that the category of persons for whom the petition was instituted, has been delineated as described above.
4. The Petition was brought for and on behalf of those who were affected by the forceful eviction of their motor vehicles from parking in the affected areas.
5. Secondly, the petition had, at its core, the notice dated 19th February 2021, which was effective from 22nd February 2021.
6. Thirdly, the Petitioners have specified that the two Boda Boda Groups of “*CHOPPIES*” and “*TUFFOAM*” respectively, had a total membership of 73.
7. As the Petitioners stated, the notice dated 19th February 2021;

“..... demanded that all vehicles, tuk tuks and motorbikes must park along the ‘Back Street’ and outside the mainstream Oginga Odinga Street.”
8. The Petitioners also pointed out that the notice in issue had further outlawed any sale of wares on the newly constructed non-motorized transport lanes within the Kisumu Central Business District.
9. The main complaint was that the Petitioners had not been consulted by the Respondents, before decisions were made to forcibly remove them.
10. The Petitioners were of the firm view that, as persons who were directly affected by the actions of the Respondents, they ought to have been engaged in crafting a Resettlement Policy Framework which would have defined the Policies, Procedures, Roles and Responsibilities for managing the involuntary resettlement.
11. The Petitioners asked the Court to hold that the Respondents had infringed their right to dignity under **Article 28**, when they carried out the forced evictions of the Petitioners.
12. It was further contended by the Petitioners that the Respondents had subjected them to inhuman treatment, contrary to **Article 25** of the **Constitution**.
13. Thirdly, the Respondents are said to have infringed on the Petitioners right to life, contrary to **Article 26** of the **Constitution**. In that regard, the Petitioners pointed out that the Respondents destroyed their means of livelihood, hence exposing them to life-threatening conditions and diseases.
14. The Petitioners also accused the Respondents of infringing upon their right to equal protection and benefit of the law, by carrying out forced re-route without adequate notice, and without alternative settlement or compensation, contrary to **Article 27** of the **Constitution**.
15. The Petitioners’ other complaint was that the Respondents had subjected them to inhuman and degrading treatment contrary to **Article 29 (f)** of the **Constitution**.
16. The Petitioners’ right to property was also said to have been infringed by the Respondents, contrary to **Article 40** of the **Constitution**.
17. The Respondents are also said to have compromised the Children’s right to education contrary to **Article 43 (1)** of the **Constitution**. In that respect, the Petitioners pointed out that the Respondents had abruptly destroyed the homes of the children’s parents, without providing alternative shelter.
18. The Respondents also allegedly denied the Petitioners their right to fair administrative action (due process), contrary to **Article 47** of the **Constitution**. According to the Petitioners, their evictions or re-route was conducted without following the requisite guidelines.
19. The Respondents were further said to have subjected women and widows, (who are the majority in hawking and sale in the streets), to inhuman treatment notwithstanding that they are minority and marginalized groups that the state ought to pro-actively assist through affirmative action.
20. Furthermore, the Respondents are said to have failed to treat the Petitioners with human dignity, social justice, equality and human rights, contrary to **Articles 28** and **10 (2) (b)** of the **Constitution**.
21. By destroying the Petitioners’ businesses, the Respondents are said to have, thereby, threatened to intentionally deprive the Petitioners their right to life, contrary to **Article 26 (3)** of the **Constitution**.
22. The manner in which the Respondents had acted against the Petitioners was described as being cruel, inhuman and degrading, and thus contrary to **Article 29 (f)** of the

Constitution.

23. The Respondents were also said to have failed to implement legislation to fulfil Kenya's international obligations in respect of human rights and fundamental freedoms, pursuant to **Article 21 (4)** of the **Constitution**. In that respect, the Petitioners asserted that the Respondents had breached their right to adequate standard of living, as well as their right to the opportunity to gain living by their work of choice.

24. In the light of the foregoing, the Petitioners sought the following Orders;

“a) THAT this court finds and so declares that the respondents have jointly and severally been responsible for the denial/ violation/infringement of the petitioners rights and fundamental rights in the Bill of Rights under Articles 10 (2) (b),25, 26, 27 (1), 28, 29 (f), 40, 43 (1), 47 and 232 91) (c) of the Constitution.

b) THAT the respondents engage the petitioners and all the Project Affected Persons in KISUMU CITY –Central Business District (CBD) more particularly boda bodas, tuk tuks,taxis, private vehicles and traders within the city center and more specifically Oginga Odinga and Angawa Streets of KISUMU CITY Central Business District (CBD) IN KISUMU COUNTY in crafting a Relocation Action Plan before implementation of the public notice dated 19/02/2021 and effective on 22/02/2021.

c) THAT the respondents engage the petitioners and all the Project Affected Persons in KISUMU CITY – Central Business District (CBD) more particularly boda bodas, tuk tuks, taxis, private vehicles and traders within the city centre and more specifically Oginga Odinga and Angawa Streets of KISUMU CITY Central Business District (CBD) IN KISUMU COUNTY be entitled to compensation.

d) THAT implementation of the Kenya Urban Project in KISUMU CITY by the respondents must be preceded by a Resettlement Policy Framework for managing the Project Affected Persons.

f) Damages

g) Costs of the petition.”

25. The Petition was supported by an affidavit sworn by the 1st Petitioner. Thereafter, several further affidavits were filed to support the Petition.

26. In answer to the Petition the Respondents asserted that they had issued appropriate notices to the persons concerned.

27. Secondly, the Respondents asserted that they engaged the Applicants in discussions and consultations, during which agreeable solutions were developed. In other words, the Respondents talked about public participation.

28. Having given due consideration to the Petition, I note that whereas the Petitioners asserted that their action was in the nature of the “*class interest of citizens*” who had been affected by arbitrary forceful eviction, there was no distinct identifiable class of persons specified as the claimants.

29. I acknowledge that groups such as the Choppies Roundabout Boda Boda Youth, and the Tuffoam Mall Boda Boda Riders Self Help Group are homogenous and therefore constitute “*persons*” who might be able to sue or be sued.

30. However, when the Petition alleges that it had also been lodged on behalf of

“all other affected owners ofBoda bodas, tuk tuks, taxis, private vehicles and traders within the City Centre and more specifically Oginga Odinga and Angawa Streets of KISUMU CITY Central Business District (CBD) in KISUMU COUNTY”; it becomes difficult to know who exactly has brought the action.

31. I hold the view that every party to litigation should be distinct and identifiable. Persons who do not want to be recognized as petitioners or claimants should not seek to benefit from orders which might be granted by the court.

32. Similarly, if the litigation was unsuccessful, and the Court were to penalize the petitioners or claimants, the successful Respondent ought to know who he can pursue, in the event that the Court awarded costs to the Respondent.

33. In this case, there was reference to two distinct groups and also to all affected owners of boda bodas, tuk tuks, taxis, private vehicles and traders within the designated area in the Kisumu City Central Business District.

34. Therefore, in order for any such other persons to be deemed either as petitioners or as those who would be bound by any decision of the Court, they would need to prove ownership of their respective businesses or vehicles: That was not done.

35. When canvassing the petition, the learned advocates for the Petitioners submitted that the case before me was about;

“..... the general implementation of the World Bank funded Kenya Urban Project in KISUMU CITY which has been haphazardly done by the respondents, with drastic consequences upon those in the transport industry and various cadre of traders within KISUMU CITY i.e. the main streets (Oginga Odinga, Angawa, Backstreet and Jomo Kenyatta Highway) of Kisumu Central Business District (CBD), Kibuye Market, Winnart Complex and Backstreet lane (adjoining Varsity Plaza, Mega Plaza and Akamba Bus Stage among others).”

36. Evidently, the submissions relate to a much wider area than that specified in the Petition.

37. In the circumstances, it becomes very difficult to analyze the applicability of the law to such a diverse and expansive category of persons, who do not appear to share defined common circumstances.

38. Whereas the petition specifically complained about the Notice dated 19th January 2021, the Petitioners have exhibited written communication which have the following information;

(a) *Further Affidavit of MACKENZI AYIGA which talks about eviction of about 100 trader in EARLY 2019; In his affidavit, Ayiga talks about selected officials who engaged the respondents, with the assistance of their MCA.*

In any event, Ayiga states that the Governor eventually promised to allocate new spaces to the traders at the newly constructed MAENDELEO MARKET, which was “next to our original business sites.”

(b) *Further Affidavit of BENSON MBOYA WERE, who mentioned that sometimes in mid – 2020 the respondents informed the traders that the traders would need to move out of the streets.*

That indicates that some traders had received notification from as early as mid – 2020.

(c) *Further Affidavit of NAPHTALI OSOROBOSIRE states that “on or about mid – July 2019” the traders at Akamba Lane were informed to vacate the entire place. He said that the information was relayed to the traders by the DC and the GOVERNOR.*

(d) *Further Affidavit of DANIEL OTIENO OLOO; JOHN OCHIENG OWITI; NICHOLAS OCHIENG OMONDI; and ALLOYCE OKOTH indicates that all the 4 deponents had been aware of a demand made in mid – April 2020, to have traders vacate the area along Angawa Street, and a Notice of eviction from Kibuye Market, which notice was delivered on 2nd December 2020.*

Indeed, the deponents indicated that the traders were evicted from Kibuye Market in December 2020.

(e) *BENARD BOLO OMONDI swore an affidavit indicating that on or about June 2020, he and his colleagues were forcibly removed from the Oginga Odinga Street.*

(f) *AMOS OTIENO, in his affidavit said that sometimes on or about January 2020 taxi drivers were forcibly removed from the right lane of Jomo Kenyatta Highway.*

(g) *RABBY OKEYO ORINDA also swore an affidavit in which he made reference to the forcible removal of taxi drivers from Jomo Kenyatta Highway, on or about January 2020.*

(h) *GEORGE OUMA ABONGO used to make furniture at Kibuye Market. He deponed that he and his colleagues were forcibly removed in February and October 2020.*

(i) *BOAZ ONYANGO swore an affidavit stating that sometimes in late 2017, their containers were demolished at night.*

He also talked about February 2019 and October 2020 as the dates when the respondents suddenly removed traders along the areas where the respondents wanted to put in cabros along non-motorized lanes. Finally, Boaz made reference to general demolitions in July 2020.

(j) *FRANCIS OWUOR OMOLLO deponed that an eviction notice was served on or about mid – June 2019.*

Thereafter, and within 24 hours of that notice, demolitions were carried out at night.

Later, at paragraph 23 of his affidavit, Francis Omollo said that their premises were demolished in August 2019.

(k) *EUNICE AKOTH WERE swore an affidavit stating that the “Hope for The Future Women Group” was forcibly evicted from Kibuye Market in August 2019.*

(l) *JANE WAITHERA NDUTA’s affidavit indicates that her premises was demolished within 24 hours, after she was ambushed with a notice in mid – June 2019.*

39. In sum total, the evidence presented to the Court did not support the assertions in the petition, concerning the Notice dated 19th February 2021. The evidence told the stories of different people who were forcibly evicted at different times, from different locations. The said evictions were effected after some form of notices were issued. And although the said notices appear to have been too short in the circumstances, the Court cannot utilize that evidence to conclude that in respect to the Petitioners, their circumstances were similar to that of those witnesses.

40. I also find that the Respondents have provided evidence to show that they organized several stakeholder discussions between 23rd March 2016 and 20th November 2018, at which representatives of the Matatu Sector; Boda Boda Sector; and Street Vendors participated.

41. It is during the said forums of “*public participation*” that the Petitioners ought to have put forward their proposals for consideration by all the stakeholders.

42. The Court cannot now be called upon to determine how the stakeholders could have resolved the issue of involuntary eviction of persons from the Central Business District of Kisumu City.

43. As the Petitioners have pointed out;

“Potential evictees faced with eviction on grounds of public interest, have a right to petition the Court for protection under Article 23 (3) of the Constitution and the Court may craft orders aimed at protecting that right, such as compensation; the requirement of adequate notice before eviction; the observance of humane conditions during eviction and the provision of alternative land for resettlement.”

44. In order to fashion appropriate reliefs on specific cases, as the Petitioners have acknowledged, the Court has to be provided with a very clear picture of the exact circumstances prevailing in the said specific cases. I say so because when a claimant bundles together persons whose circumstances and issues are diverse, it becomes difficult to fashion an appropriate relief.

45. As an example, persons who own and operate either boda bodas or tuk tuks do not have the same or similar requirements as those for a street hawker or a carpenter. I find that the Petitioners failed to set out, with a reasonable degree of precision, what their complaints were; who exactly they had brought the action for; and the remedies sought.

46. The lack of precision implies that if the Court were to order for the payment of compensation, it would constitute an invitation to utter confusion, as all manner of persons could have been given an opportunity to put forward their claims.

47. I note that whilst the Petition specifies that it is for and on behalf of members of Choppies Roundabout Boda Boda Youth Group; Tuffoam Mall Boda Boda Riders Self Help Group and all other affected owners of boda bodas, tuk tuks, taxis, private vehicles and traders within the city centre; and more specifically Oginga Odinga and Angawa Street of Kisumu City; the final submissions expanded the scope to include;

(a) About 200 traders at Backstreet

(behind Varsity Plaza, Mega Plaza up to Akamba Bus Terminus);

(b) About 150 traders at Winmart Complex;

(c) About 360 traders along Gumbi Street (Bus Stage, Fanana/Maendeleo Market); and

(d) 20,000 traders at the Kibuye Market.

48. The Court cannot permit a case to be enlarged at the stage of submissions, so as to bring on board, persons who were not originally parties to the said case.

49. Meanwhile, whilst the petition specified that Choppies Boda Boda Group had 33 members, whilst Tuffoam Mall Boda Boda Group had 40 members, the claim for compensation, (as indicated in the submissions dated 7th May 2021) was for about 500 motorbikes, and 200 tuk tuks.

50. In effect, compensation was being sought for a much much larger group of persons than the petition first specified. No explanation was tendered for the expanded numbers, nor was leave from the court sought to bring on board the extra numbers.

51. In any event, the claims put forward by the persons who filed affidavits, were so varied that it would have been necessary for the Petitioners to justify the amount asked for in the submissions, as those amounts are pegged to clusters of persons, yet it has not been demonstrated that the persons in each such cluster should receive similar compensation.

52. In the result, the Petition is without merit, and is dismissed.

53. However, as this is a public-interest litigation, I order each party to meet his or her own costs.

DATED, SIGNED and DELIVERED at KISUMU

This 28th day of **October** 2021

FRED A. OCHIENG

JUDGE