



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 5 OF 2015**

**IN THE MATTER OF ARTICLE 1, 2, 3(1), 10, 19, 20, 21, 22, 23(1) & 3, 27, 40,**

**43(1)(e), 47, 48, 50, 159, 165(3)(b)258(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF RULES 10, 11, 20 & 21 OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND PROCEDURE) RULES, 2013**

**AND**

**IN THE MATTER OF SECTION 6(6), 30(3)(g), 87(a), 105(d) AND 115 OF THE COUNTY**

**GOVERNMENT ACT AND SECTION 29(E) OF THE PHYSICAL PLANNING ACT.**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 3, 10(1),**

**2(c), 40, 42, 43(1)(E), 47, 48, 50 and 159(1) & (2) OF THE CONSTITUTION OF KENYA**

**WILLIAM NJOROGE KARANJA.....1<sup>ST</sup> PETITIONER**

**SAMUEL MBUGUA IKUMBI.....2<sup>ND</sup> PETITIONER**

**SAMUEL MBUGUA NJENGA T/A VICMARK.....3<sup>RD</sup> PETITIONER**

**NAKURU COSMETICS CENTRE LIMITED.....4<sup>TH</sup> PETITIONER**

**FAMERS WORLD LIMITED.....5<sup>TH</sup> PETITIONER**

**IBRAHIM MOHAMED OSMAN T/A EAGLE.....6<sup>TH</sup> PETITIONER**

**P.G.S ENTERPRISES LIMITED.....7<sup>TH</sup> PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU.....RESPONDENT**

**JUDGMENT**

1. The seven Petitioners herein are the registered owners of Nakuru Municipality Block 10/68, Nakuru Municipality Block 10/92, Nakuru Municipality Block 5/143, Nakuru Municipality Block 5/144, Nakuru Municipality Block 5/145, Nakuru Municipality Block 5/243, and Nakuru Municipality Block 10/405, respectively. The Petitioners' properties are located along Oginga Odinga Road, within Nakuru Town.

The Respondent is the County Government of Nakuru.

2. The Petitioners are aggrieved by the Respondent's decision to relocate Nakuru Street Traders and Hawkers from the Central Business District Area (CBD) to the Service Lane behind Oginga Odinga Road on the grounds that the decision was made in gross violation of the Petitioners' constitutional right to equality, freedom from discrimination and fair administrative action.

3. In a Petition dated 21/01/2015, amended on 29/01/2016, and further amended on 05/05/2021, the Petitioners pray for the following reliefs:

*a. A declaration that the decision and process of relocating the Nakuru Street Traders and Hawkers from the Central Business District Area to the Service Lane behind Oginga Odinga Road was opaque, clandestine, capricious, whimsical, and contrary to Article 27, 40, 47 and 69 (1)(d) of the Constitution of Kenya hence unconstitutional consequently null and void.*

*b. A declaration that the actions above of the Respondent contravened Article 10, 27, 40, 47 and 73 of the Constitution of Kenya*

*c. A Declaration that the Respondent has abdicated his duty to respect and uphold the Constitution of Kenya in its administrative actions contrary to Article 47 (1) and (2) of the Constitution.*

*d. An order to issue directing the Respondent, its agents and/ or Servants to relocate and/ or remove the Nakuru Street Traders and Hawkers from the Petitioner's backyard along the service lane behind Oginga Odinga Road and/or any place adjacent to the Petitioner's premises along Oginga Odinga Road*

*e. Costs incidental to this Petition*

*f. Any other reliefs that this Court may deem fit*

4. The Petition is supported by the Affidavit of William Njoroge Karanja, the 1<sup>st</sup> Petitioner. The Petitioners contend that sometime in January 2015, the Respondent made the decision to relocate Nakuru Street Traders and Hawkers from the CBD to the backyard of the Petitioners' businesses along the Service Lane behind Oginga Odinga Road. At the time, of filing the Petition, some of the traders had already relocated and commenced construction of their stalls.

5. According to the Petitioners, this relocation has totally blocked their service lane which has their sewerage system, power system, loading areas, fire exits and other vital services to their businesses. It has also blocked the 5<sup>th</sup> Petitioner's rear door which poses a security threat and total inconvenience to the business. It is additionally the 1<sup>st</sup> Petitioner's case that some of the traders are operating under his construction site, which is a risk to their lives and have refused to vacate despite his pleas.

6. As a result of the relocation, the Petitioners say their businesses have become inaccessible to them and their clients and they are incurring immense losses in addition to posing a security threat to their clients and business. They contend that the Respondent did not consult them before relocating the traders to their backyard which is a violation of their rights.

7. The Petitioners claim violation of Section 30(3)(g), 66, 102(i), 105(d) and 115 of the County Government Act, which they say obligates the Respondent to ensure public participation and provision of clear and unambiguous information on any matter under consideration in the planning process. They also claim violation of Section 87(a) and (b) of the County Government Act which they contend obligates the Respondent to ensure timely and reasonable access to information, data, documents, and the process of formulating and implementing policies, laws, and regulations.

8. They also allege violation of Section 29 of the Physical Planning Act which they say empowers the Respondent to formulate by-laws to regulate zoning in respect of use and density, they claim the Respondent has breached since their backyard is not a designated market area.

9. They believe the relocation was carried out fraudulently and secretly, with the aim of avoiding public participation, the result of which their rights and interests were prejudiced. According to them the said relocation of hawkers is an infringement of their constitutional right to property and social security since the hawkers pose a security threat to the Petitioners' massive investment.

10. They also allege violation of their right to participation in the management, protection and conservation of the environment and their right to a clean and healthy environment. They are apprehensive that if the traders are permanently relocated, they will continue to suffer irreparable loss.

11. The Petition is opposed through the Respondent's affidavit dated 19/02/2015 sworn by Joseph M. Motari, the Respondent's Secretary. The Respondent's case is that the hawkers have been relocated and allocated space in public open space and not on land owned/ occupied by the Petitioners. The Respondent contends that its actions are not discriminatory and that conversely, the orders sought would offer preferential treatment to the Petitioners and thus be discriminatory. According to the Respondent public interest should prevail over the private interests of the Petitioners.

12. The Respondent contends further that the relocation of traders was informed by deliberations made in May 2013, where the Nakuru Business Coalition, the apex body of business membership organization brought over 16 organizations to discuss the creation of a conducive environment to foster economic development in the County and Country. The Respondent says that the issues discussed were the creation of a business-friendly environment, decongesting the CBD by zoning designated areas for trading by hawkers and relocating wholesale market to Free Area. According to the Respondent, the Petitioners were represented at the said meeting by various Business Membership Organizations. Consequently, the Petitioners have been part of the deliberations on the reorganization of Nakuru Town and cannot go back on their own recommendations.

13. The Respondent says that save from citing various omnibus article of the Constitution, the Petitioners have provided little to no particulars of the alleged complaints and manner of infringement or the jurisdictional basis of their action. To the Respondent it is not clear whether the Petition is for the enforcement of fundamental rights and freedoms under the Bill of Rights or for the enforcement of the Constitution. To point this out, the Respondent challenges Paragraphs 22, 24, 25, 26, 27, which it says have not enumerated the particulars of the alleged infringed rights. The Respondent contends further that the Further Amended Petition violates the provisions of Rule 10(2) of the Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, has failed the requirement of precision and does not meet the substantive test requirement in decided cases.

14. On, 15/01/2019, the Court conducted a visit to the site that is the subject of this Petition. The following general observations emerged from the site visit:

- a. It is not possible for any motorized vehicle other than two wheeled motorcycles or three wheeled tricycles to pass through the (fire) lane at the site.
- b. It is not feasible to use Oginga Odinga Street to load and offload deliveries from Naivas Supermarket who lease premises from the 6<sup>th</sup> Petitioner. However, the supermarket uses the corner with Mburu Gichua Road for deliveries.
- c. The rear entrances for other businesses along Oginga Odinga Road are blocked by the stalls.
- d. Vehicles cannot access the business premises along Oginga Odinga Street
- e. There are questions whether the lane is expected to be a site for construction or maintenance of sewerage infrastructure from premises along Oginga Odinga Street
- f. There is no planned sanitation and sewerage services for the new businesses and their patrons.
- g. There is not much business taking place in the stalls.

15. Both parties filed submissions. The Petitioners' submissions are dated 02/06/2015 and 27/09/2021 while the Respondent's submissions are dated 19/06/2015.

16. Having looked at the Further Amended Petition, Affidavits by the Parties and submissions, the following issues arise for determination:

- I. Whether the Further Amended Petition meets the threshold of a Petition.
- II. Whether the relocation of hawkers required public participation.
- III. Whether the Respondent violated the Respondents right to fair administrative action, right to property and right to a clean and safe environment.

17. It is submitted for the Petitioners that the Respondent did not owe any duty to the traders and hawkers to allocate them new premises to carry on their business. This the Petitioners argue is because the traders' and hawkers are freelance business owners without any interest in land and there was therefore no duty imposed on the Respondent to offer them business premises.

18. The Petitioners also submit that their rights and fundamental freedoms have been violated by the Respondent's decision. They argue that in ensuring one person's right to earn a living and be protected from hunger and to have social security under Article 43, the Authority is to ensure that it is not violating the same right for another person. They cite the case of *Micro & Small Enterprises Association of Kenya Mombasa Branch (Acting in the interest of its members to the exclusion of those who may have sought reliefs in their own right) v Mombasa County Government & 43 others [2014] eKLR* as well as the provisions of Article 24 of the Constitution. They argue that by moving the traders to the Petitioner's backyard, the Respondent failed to the balance of convenience test.

19. On the claim for violation of their right to administrative action under Article 47 of the Constitution, the Petitioners argue that the decision to relocate the hawkers was done without consulting them or being given reasons. They rely on the case of *Multiple Hauliers East Africa Limited v Attorney General & 10 Others [2013] eKLR* and argue that where an administrative action is likely to adversely affect an individual, the individual ought to be given reasons thereof and be granted an opportunity to be heard. They reject the argument by the respondent that they were invited to a meeting to discuss the issue of relocation of the hawkers or that the issue was ever discussed at all. They also cite the case of *Commissioner of Lands v Kunste Hotel Limited [1997] eKLR*.

20. The Petitioners argue that there was no public participation in the relocation process as required by Sections 30(3)(g), 66, 102 (i) 105(d) and 115 of the County Government Act. They cite the case of *Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR*. On the allegation of violation of Article 40 of the Constitution it is the Petitioners' submission that the Respondent's decision has denied them quiet enjoyment of their land. They rely on the case of *Sanderson v Berwick-upon-Tweed Corporation [1884] 13 Q.B.D. 547, 551* in support of their argument that the scope of quiet enjoyment extends to any substantial interference without any direct of physical injury to the land. They contend that by relocating the hawkers to the Petitioners' backyard and blocking their properties' rear entrances, the Respondent has breached the right to quiet enjoyment.

21. The Petitioners base their claim for violation of their right to a clean and healthy environment under Article 42 and 69 (1)(d) of the Constitution on the interference with access to the Petitioners' sewerage system and congestion they allege has been caused by the relocation. They cite the case of *Friends of Lake Turkana v Attorney General & 2 Others [2014] eKLR* in urging that the Court applies the

precautionary principle; in that the protection of the environment is based on taking precaution even if there is no clear indication of harm. On the alleged violation of Article 69(1)(d) the Petitioners argue that they are entitled to the relief sought because the Respondent breached their legitimate expectation.

22. In its submissions, the Respondent maintains that the Petition as drafted does not meet the criteria set out in Rule 10(2) of the Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Respondent maintains that the Petition does not meet the threshold of a Constitutional Petition for lack of precision and comprehensiveness. It cites the cases of **Anarita Karimi Njeru vs The Republic [1976-1980] KLR 1272**, **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** and **Peter O. Njoge v Francis Ole Kaparo & 4 Others [2007] eKLR**.

23. The Respondent submits that it owed a duty to provide alternative space for the traders and contends that it was performing the duties of County Governments set out in the case of **Micro & Small Enterprises Association of Kenya Mombasa Branch (Acting in the interest of its members to the exclusion of those who may have sought reliefs in their own right) v Mombasa County Government & 43 others [2014] eKLR**

24. The Respondent also argues that the Petitioners have neither controverted the averments in its Affidavit nor presented proof in support of the alleged violation of their rights as required by Section 107 and 108 of the Evidence Act. The Respondent denies having violated the Petitioners' rights under Article 43 since the hawkers were allocated public land and the Petitioners have therefore, failed to show how their Socio-economic rights have been infringed.

25. The Respondent denies the alleged infringement of the Petitioners' right to fair administrative action and cites the case of **Mereka & Company Advocates v Invesco Assurance Co. Ltd [2015] eKLR**. The Respondent submits that having failed to file a Replying Affidavit to contest the averments on the meeting held in May 2013 and the Petitioners' representation at the said meeting, the Respondent's averments remain uncontested and amounts to an admission. It relies on the case of **Crown Barger Kenya Ltd v Kalpesh Vasuder Devani & another [2004] eKLR**

26. The Respondent also denies the allegation of infringement of Article 40 of the Constitution and argues that the traders having been relocated to public land, the Petitioners' right to quiet enjoyment of property has not been infringed. They also deny that any legitimate expectation had accrued to the Petitioners. They rely on the case of **Oindi Zaippeline & 39 Others v Karatina University & Another [2015] eKLR**. They argue that just because the Petitioners were using the subject public space did not give them any proprietary right over the same.

27. The Respondent denies violating Article 42 & 69(1)(d) of the Constitution on the basis that the Petitioners have not provided proof of the same. The Respondent argues that the relocation of the traders does not amount to a public project that requires the application of the precautionary principle.

28. Lastly, the Respondent submits that the Petitioners are not entitled to the reliefs sought because the traders have already been relocated and it is in public interest that they remain in the allocated area.

29. In their Further Submissions, the Petitioners reject the Respondent's assertion that their Petition lacks precision. They argue that they have established the rights infringed by the Respondent's actions and that the Petition ought to be determined on its merits. They have cited the case of **Mape Building & General Engineering v Attorney General & 3 Others [2016] eKLR** where it was held that the competency and threshold did not constitute precision in drafting.

30. They also argue that the allocation and building of semi-permanent structures by the Respondent in an area designated as Road Reserve goes against the provisions of Section 6 and 40 of the Physical Land Use and Planning Act and Sections 6(6) of the County Governments Act. They submit that the Respondent failed to consider the rights of the Petitioners among members of the public who would be affected by the relocation of traders. They cite the case of **James Mbugua Gichuru & Another v City Council of Nairobi [2013] eKLR**. They ask the Court to rely on its Site Visit Report dated 10/06/2019. They cite the case of **Beatrice Ngonyo Ndungu & Another v Samuel K. Kanyoro & 2 Others [2017] eKLR**

31. On the first issue, Rule 10(2) of the of the Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure) Rules, 2013 provides for the form of a Constitutional Petition. Other than the details and addresses of the parties, the substantive requirements in a Constitutional Petition are the facts relied upon, the Constitutional provision violated, and the nature of injury caused or likely to be caused to the petitioner, details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition and the reliefs sought.

32. It is not in dispute what act the Petitioners are aggrieved by. The Petitioners have set out that the Respondent's actions have infringed *inter alia* their right to peaceful and quiet enjoyment of their property, their right to a clean and healthy environment and their right to fair administrative action. It is my considered view that the Petitioners pleaded with reasonable precision and specificity the Constitutional provisions, and the nature of injuries they allege have been caused by the Respondent's actions.

33. I will now to the second issue for determination: was the action by the Respondent taken after meeting the requirement of public participation required under the Constitution?

34. Public participation is one of the principles of under Article 10 of the Constitution and a mandatory requirement in the process of developing public policy, making legislation, and making decisions that affect the public. The guiding principles for public participation were set out by the Supreme Court in **British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR** as follows:

Guiding Principles for public participation

- (i) *As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.*
- (ii) *The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.*
- (iii) *The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.*
- (iv) *Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.*
- (v) *Public participation is not an abstract notion; it must be purposive and meaningful.*
- (vi) *Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.*
- (vii) *Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.*
- (viii) *Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.*
- (ix) *Components of meaningful public participation include the following:*
  - a) *clarity of the subject matter for the public to understand;*
  - b) *structures and processes (medium of engagement) of participation that are clear and simple;*
  - c) *opportunity for balanced influence from the public in general;*
  - d) *commitment to the process;*
  - e) *inclusive and effective representation;*
  - f) *integrity and transparency of the process;*
  - g) *capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.*

35. The Respondent’s attempt at responding to this issue has been that they had a stakeholder meeting concerning improving the business environment withing Nakuru, where the Petitioners were represented. As pointed out by the Supreme Court in the **British American Tobacco Case**, allegations of lack of public participation must be considered within the peculiar circumstances of each case and the mode, degree, scope, and extent of public participation is to be determined on a case-to-case basis.

36. In my view, the making of the decision to relocate the traders falls within the category of decisions that needed not have extensive oral hearings and submissions, but one that needed the involvement of the parties who would be affected by that decision. This was a decision that would directly affect the Petitioners and ought to have been done in direct consultation with the Petitioners, as opposed to the purported stakeholders, whose representation of the Petitioners’ interests is unascertainable.

37. Article 47 (2) of the Constitution mandates that 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. The Respondent relocated the traders to an area they knew was likely to adversely affect the Petitioners’ access to their properties. It neither offered a chance to the Petitioners to give their views, not informed them of the intended decision.

38. The Respondent has also advanced the argument that because the Traders have already been relocated, it is in public interest that they remain in the allocated area. The Respondent argues that public interest should prevail over the Petitioners’ private interest.

39. The Supreme Court in **Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2020] eKLR** dealt with the issue of the right to fair administrative action vis a vis private interest. It was stated thus:

*On these established legal principles, we agree with the petitioners that in the promotion of public policy and efficient administration of the securities market in Kenya, the right to a fair administrative action cannot be sacrificed at the altar of efficiency or public interest. In this regard, we agree with the High Court decision in Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya [2014] eKLR that “there can never be public interest in breach of the law ...*

because public interest must accord to the Constitution and the law as the rule of law is one of the national values under Article 10 of the Constitution.” And as the Court of Appeal added in *Capital Markets Authority v Jeremiah Kiereini & Another* [2014] eKLR, individual rights “are so fundamental that they cannot be limited even by public interest.”

*In this case therefore, in the discharge of its dual mandate, laudable as it obviously is, the respondent cannot be allowed to ride roughshod over the non-derogable constitutional rights of investors. That will obviously be counterproductive and instead of engendering the confidence required in the capital markets, it will scare away the very prospective investors it is seeking to entice. So, if broader and greater public interest cannot override the right to fair hearing, it follows therefore, that narrow interests such as fostering investor confidence in the securities market cannot be used as an excuse to deprive the petitioners of their constitutional right to a fair hearing of the allegations against them.*

40. Similarly in this case, the Respondent cannot hide behind the need to create a conducive business environment and public interest while derogating the Petitioners’ rights.

41. On the right to property, Article 40 of the Constitution offers three modes of protection of the right to property. First, is the right to acquire and own property. Second is the protection against enactment of laws that may deprive or limit enjoyment of property and third is protection against deprivation of property, interest and/or right in property by the state, unless for the justifications provided therein.

42. The Land Act defines an interest as a right in or over a land. Is the inability by the Petitioners to access their properties through the rear entrances an infringement of the Petitioner’s right to property? As the Court observed during its scene visit, the relocation of the traders to the service lane behind the Petitioners’ premises has consequential impacts on the use of their properties. In particular, it negatively affects the ability to use the rear for deliveries and parking. There is no question that this causes severe inconvenience for the Petitioners and their customers. The Petitioners claim, and there has been no serious refutation, that this has led to severe denudation of the economic value of their premises.

43. While I am not persuaded, on the material provided, that a case has been made out that the relocation of the traders had led to the infringement of the Petitioners’ right to a clean environment, I easily find that the relocation has led to the severe denudation of the economic value of the Petitioners’ Property. Besides, it was done without subjecting it to the required public participation and consultation and in clear violation of various Acts of Parliament including the Physical Planning Act and the County Government Act.

44. In this case, the County Government has used its powers to severely affect the enjoyment of the right to property by the Petitioners. This is neither the lawful exercise of eminent domain nor the lawful use of the County’s Police Powers. The former would allow the County to take property because of its need for the public use while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest. Here, the County has neither taken the Petitioner’s property for public use nor regulated its use. The County has, instead, severely impaired access to the Petitioners’ properties and thereby deprived the properties of their economic value by authorizing third parties to erect structures on an established service lane.

45. The Petitioners have established by uncontroverted evidence, and the Court’s own visit confirmed, that the blocking of the service lane severely restricts access to the Properties and thereby deprives the Properties of economic value. This is not regulation *strictu sensu* which would then require an analysis whether it has “gone too far”. Instead, this is simply illegal governmental action. It is not an act of zoning; it is an act of inverse invasion of private property. Appeals to public interest cannot justify such illegal invasion: the government is allowed only two routes to secure public interests so far as private property is concerned: lawful use of eminent domain followed by just compensation or lawful use of regulation which does not go too far to warrant its classification as a regulatory taking. Short of this, the government is simply imposing upon a few individuals the costs of furthering the public interest. This is plainly discriminatory and unlawful.

46. From the foregoing, the following orders recommend themselves:

**a. A declaration is hereby issued that the Respondent’s decision to relocate Nakuru Street Traders and Hawkers from the Central Business District Area to the Service Lane behind Oginga Odinga Road is in violation Petitioners’ right to property and the constitutional right to fair administrative action.**

**b. An order is hereby issued directing the Respondent to relocate and remove the Nakuru Street Traders and Hawkers along Service Lane behind Oginga Odinga Road and to remove any stalls, kiosks and/ or structures erected thereupon within 90 days from the date hereof.**

**c. The Respondent to pay the cost of this Petition.**

47. Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF DECEMBER 2021**

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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.