



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 16 OF 2019

IN THE MATTER OF: ENFORCEMENT OF

FUNDAMENTAL RIGHTS & FREEDOMS OF THE

INDIVIDUAL AS ENSHRINED UNDER THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ENFORCEMENT OF ARTICLES 29(C),

27(1), 29(A), 40 & 47 OF THE CONSTITUTION OF KENYA

BETWEEN

1. EUSOPHIA NYAGA KANYIFA

2. IRENE NDUTA NJOMO

3. LUCY MUSINYA (All Suing on behalf of members

of NORTH COAST BEACH

MANAGEMENT COMMITTEE).....PETITIONERS

VERSUS

1. COUNTY GOVERNMENT OF MOMBASA

2. THE MINISTER OF NATIONAL HERITAGE & CULTURE

3. CABINET SECRETARY FOR TREASURY

4. COMMISSIONER FOR LANDS

5. NATIONAL LANDS COMMISSION.....RESPONDENTS

JUDGMENT

The Petition

1. This is the Judgment on amended petition dated 2/10/2019.

2. The Petitioners are members of a registered Community Based Organization at Jomo Kenyatta Public Beach (popularly known as “*Pirates Beach*”) in Mombasa and acts as an umbrella association for work specific beach operating CBO’S comprising of Fishermen, Beach Tube Renters, Beach Photographers, Beach Community Traders and Recreational Boat Owners and related businesses. The Plots upon which they operate the said businesses are **L.R No. MN/17177** and **L.R No. MN/17178** measuring 3.756 Hectares. The Petitioners aver that the said land was reserved by the 1st Respondent’s precursor in 1995 for public recreational purposes, who issued a Leasehold Title under L.R

MN/1/9314 measuring 3.756 Hectares for 99 Years with effect from 1980. However, in 1996 the land was subdivided into two plots being plot Nos. 1916 and 1917 whereby Parcel MN/1916 was changed to acquire designate “residential” as opposed to the “public recreational purposes” and leased to one Samu Limited until a suit was filed when the 4th Respondent was directed to revoke the Title Grant. The Petitioners state that the 4th Respondent on 1st March, 2010 issued new Titles in regards to the two plots being L.R MN/17177 and L.R MN/17178 measuring 3.367 Ha. However, there was an unexplained loss of 0.389 Hectares from the Original acreage. The Petitioners now want to know where the 0.389 Ha. went to.

3. Further the Petitioners state that they are over 400 registered members of the CBO and are licensed and authorized to carry on business on the public beach and their activities go way back to 1970.

4. The Petitioners now in their petition pray for the following orders:

a) A declaration that by virtue of Article 29 (c) of the Constitution of Kenya, the Petitioners are not entitled not to be subjected to any form of violence of any nature meted out by the 1st Respondent, its servants, and agents on diverse dates between October 2018 and December 2018.

b) A declaration that by virtue of Article 27(1) of the Constitution of Kenya, the Petitioners are entitled to equal protection and equal benefit of the Law from the caprices and whims of the 1st Respondent, its servants and agents as occasioned upon the 1st and 2nd Petitioners on diverse dates between October 2018 and December 2018.

c) A declaration that pursuant to Article of the Constitution of Kenya, the Petitioners are entitled to be afforded fair administrative action by the 1st Respondent, its agents, servants and employees that is lawful, reasonable and procedurally fair and to have been given written reasons prior to the 1st Respondent embarking on the actions meted on the Petitioners on diverse dates between October 2018 and December 2018.

d) An Injunction directed against the 1st Respondent, it’s Servants, agents and employees from in any way purporting to take administrative action of any nature against the Petitioners without giving the Petitioners written reasons for undertaking the same.

e) A Declaration that the Respondents are entitled to continue using the subject matter public property to conduct business by virtue of their unwavering efforts to preserve, protect and maintain the land as a public recreational facility.

f) Against the 1st Respondent, special Damages for the unlawful eviction amounting to Kenya Shillings Twenty Seven Million Eight Hundred and Eighty Nine Thousand Nine Hundred and Fifty (Kshs. 27, 889,950)

g) Exemplary Damages.

h) Coats of this Petition.

Response to the Petition.

5. The 1st Respondent in response to the Petition filed a Replying Affidavit sworn on 3/6/2019 by **Innocent Mugabe**. The deponent is the Chief Officer Tourism, Mombasa County and swears the Affidavit on behalf of the 1st Respondent who together with the Tourism Regulatory Authority play a major role in ensuring sanity along the beaches under provisions of the Constitution of Kenya 2010 in the 4th Schedule, Part 2, Section 4 (f) and Section 7 which role includes licensing traders along the beach.

6. The 1st Respondent’s case is that sometime in 2018 it received complaints from members of the public regarding lack of space owing to the presence of traders invading the beach space which was curtailing the ability of the public to enjoy use of the beach. After a survey it was established that there was need to protect the beach shoreline within the 60 meters High Water Boundary pursuant to Article 13 of the United Nations Convention on the Law of the Sea as well as Article 2(5) of the Constitution of Kenya. The 1st Respondent states that the License issued by the Tourism Regulatory Authority does not grant the traders permission to invade the beach space in the manner that they were doing by operating beyond the limits envisioned.

7. The 1st Respondent also avers that it is within their duty to protect the marine environment by ensuring there is no discharge of waste into the Indian Ocean as the alleged traders were violating the law by operating within the 60 meters High Water Mark boundary causing public harm, nuisance and threatening the provisions of the United Nations Conventions on the Law of the Sea. The 1st Respondent issued verbal notices to the traders who were operating business in a manner that restricted access to the beach and that it is not true that the notice affected all Petitioners as alleged by the Petitioners and it is after the eviction that the affected traders caused commotion along the Mombasa-Malindi Highway.

8. The 1st Respondent states that the Petitioners lack the requisite *locus standi* to file this Petition in their own behalf and in the behalf of North Coast Beach Management Committee considering that the suit does not conform with Order 1 Rule 13 of the Civil Procedure Rules and as such this court lacks jurisdiction to handle it. Further, the North Coast Beach Management Committee had not renewed the Petitioners’ certificate of Registration of Self Help Group as at the time the cause of action arose, and as such, they do not have any legal claim against the Respondents. The 1st Respondent further avers that the issues raised in this Petition would best be handled by an ELC Court as the subject matter touches on occupation and use of land.

Cross-Petition

9. The Cross Petition is filed by the Attorney General (Suing on behalf of the Minister of National Heritage and Culture, Cabinet Secretary to the Treasury and the Commissioner of Lands) and founded on Articles 2(1), 19, 2, 20, 23, 40, 60, 62 and 165(3) of the constitution. It is supported by Affidavit sworn by Nguyo Wachira.

10. The Cross-Petitioner's Case is that in conformity with the National Museums and Heritage Act No. 6 of 2006, the suit land was Gazetted vide Gazette Notice No. 13562 of 28th September, 2012 whereby the National Museums of Kenya under the Ministry of National Heritage and Culture is statutorily required to ensure conservation of the heritage value of the site by ensuring that any developments on the area are in line with conservation standards in line with the Fourth Schedule of the Constitution of Kenya under which the public beaches fall under the functions of the County Government and that it is in this regard that they are conducting a regeneration exercise since the Cross Petitioner enjoys the title to the suit property which rights the Petitioners have breached.

11. Accordingly, the Cross-Petition prays for the following orders and declarations: -

- i) A declaration that title L.R NO. MN/17177 and LR MN/17178 is properly owned by the Cross Petitioners and the Respondents have no rights whatsoever.
- ii) A declaration that the Cross Petitioner's right to property under Article 40 of the Constitution as read together with Article 60 on Security of Lands rights have been violated by the Respondents.
- iii) A declaration that any past, present and any dealings by the Respondents with L.R NO. MN/17177 and LR MN/17178 were unlawful and unconstitutional.
- iv) A permanent Injunction restraining the Respondents, its agents, servants, employees, assignees, successors or any person claiming under them from entering and in any other way dealing with the suit property L.R NO. MN/17177 and LR MN/17178.
- v) An Order dismissing the Petition with Costs.
- vi) Costs of the Cross Petition.
- vii) Any other order or relief as the Honourable Court shall deem just to grant.

Response

12. In response to the Cross Petition Irene Nduta Jomo filed a Replying Affidavit sworn on 26/11/2019. The deponent is the 2nd Petitioner and Treasurer of North Coast Beach Management Committee. She attached a copy of the Letter of Authority as well as Minutes as "LM1"

13. The Petitioners state that they have not illegally encroached on the suit property as alleged in the Cross-Petition as they have been in occupation of the suit public land with consent and knowledge of the Tourism Regulatory Authority which falls under the Cross Petitioner docket and have been paying licence fees. They further aver that they have been the defenders and caretakers of the suit property and had it not been for the public outcry the suit property would have long been grabbed.

14. The Petitioners further state that they have not denied any of the Cross-Petitioners access to the property as alleged and that their only interest is to continue to do their small scale business along the suit property without interference from the Cross-Petitioner. They further aver that they are not opposed to having any developments on the land but are only interested in the same being done procedurally and in accordance with the law.

Submissions

Petitioner's Submissions

15. The Petitioners filed their Submissions on 18/6/2019 and through their Counsel Dr. Khaminwa, submitted that this Petition was precipitated by the 1st Respondent's actions carried out on diverse dates between October 2018 and December, 2018 where properties belonging to the Petitioners were razed down and their activities threatened. Counsel submitted that they are not claiming ownership of the suit property, only that they were violently attacked without notice during their operation on the beach with the full consent of the Respondents. Dr. Khaminwa further submitted that without the Petitioners the beach plot would have been grabbed. Counsel submitted that the eviction of the Petitioners was not lawful as there was no order from court to evict them. Counsel submitted that Petitioners are tenants with an interest in land and as such they are tenants protected by law and that is why for them to be evicted there must be an order from Court as the Country is also bound by general provisions of International Law which abhors mass eviction as it does not uphold the rule of law since the same is a potential cause of violence and that for a party to carry out mass eviction judicial process must be invoked and the same cannot be carried out arbitrarily by the executive arm of the government.

16. Dr. Khaminwa further submitted that Article 47, 35, 27 and 40 were violated and that Under Article 62 of the Constitution, Petitioners are entitled to right to access and use of the suit premises. Further, under Sections 104 and 115 of the County Government Act and also Articles 196(1) (b) and 10(2) of the Constitution, the Principle of public participation should be upheld and that where the County Government intends to commence a development project there must be public participation in order for the public to be informed of its benefits and impacts. He relied on the case **British American Tobacco vs. Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR**. Dr. Khaminwa submitted that the remedies that are available are that of Compensation, Inclusion, and Conservatory Orders.

Respondents Submissions

17. The 1st Respondent filed their written submissions on 24/9/2019 and through Mr. Tajbhai submitted that they are opposed to the Petition as the Petitioners have failed to show any relationship with the Bill of Rights in the Constitution and how the same have been breached and that there is no evidence of violence by the Respondents on the Petitioners. Counsel submitted that the Petition does not disclose the alleged 400 Petitioners since the documents filed in Court indicate only 7 of them.

18. Mr. Tajbhai submitted that the Petitioners have put temporary structures on the beach without plans and that there are incidences of insecurity in the premises and that the alleged violence upon the Petitioners may have been initiated within themselves as there is no evidence of the alleged damages. Counsel submitted that the Petitioners are hiding under pretext of public interest litigation to cater and protect their individual interest especially with regard to their own economic gain and are covering up illegal presence at the beach and that according to Article 13 of the United Nations Convention on the Law of the Sea, it is evident that the traders operating at the beach are breaching the laws such that they cover the low tide elevation which forms part of the territorial sea and therefore jeopardizing the security and safety of the general public. Mr. Tajbhai submitted that the Petitioners do not qualify to be awarded special damages as they have not specially pleaded and proven the same. They have merely attached some documents with lists of items that do not even have receipts to prove that they are the named individuals in the Petition. Counsel submitted that the Petitioners cannot claim what is not legally due to them and that the 1st Respondent ought to be seeking compensation from the Petitioners for the destruction and everyday operations along the Mombasa-Malindi Highway.

19. Mr. Mwandeje, learned counsel for the 5th Respondent submitted that the Petitioners are not claiming ownership of the Land and that the prayers sought mainly affect the 1st Respondent as it is not disputed that the Petitioners were granted Licenses which the Petitioners have not bothered to renew as they were only valid up until 31/12/2018.

Determination

20. Having considered the submissions by all the parties in the petition, I find the following issues arise for determination: -

- i) Whether the Civil Procedure Rules apply to Petitions.
- ii) Whether the Petitioners Rights were infringed.
- iii) Whether the Petitioners are entitled to the Special and General Damages Sought.

i) Whether the Civil Procedure Applies to Petitions.

21. The 1st Respondent submitted that the alleged Petitioners in this Petition are over 400 individuals but that only a few of them have given authority to the filing of this Petition and that there was no advertisement contrary to **Order 1 Rule 8** and **Order 1 Rule 13** of the Civil Procedure Rules 2010 which provides as follows: -

Order 1 Rule 8: One person may sue or defend on behalf of all in same interest

1. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

2. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

3. Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

Order 1 Rule 13 of the Civil Procedure Rules provides:-

“13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

22. The Petition herein is accompanied by a Supporting Affidavit sworn by Irene Nduta Jomo (the 2nd Petitioner) in her capacity as the Treasurer. She annexed as LM 1 a copy of the letter of authority as well as minutes by the North Coast Beach Management, and annexed thereto also, is the Certificate of Registration. This is a clear indication that the letter of Authority having been signed by one Eusephio Nyaga Kanyifa as their Chairman and Lucy Musinya Mkacharo as the Secretary, the two may be observed as the intended representatives of the 400 members of North Coast Beach Management and therefore I do not find this Petition to be contrary to the Provisions of the Civil Procedure Rules. However, more importantly, Article 22 (1) and (2) of the constitution grants the Petitioners the right to bring this petition.

“22.

(1) Every person has 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.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

ii) Whether the Petitioners Rights were infringed.

23. The Petitioners allege that on diverse dates between October 2018 and December 2018 the 1st Respondent County Askaris while in the company of armed hooligans violently raided and attacked the Petitioners who were lawfully carrying out various lawful and licensed activities at the suit property. The Petitioners submitted that they have been peacefully conducting their trading activities until that period when the 1st Respondent's agents without a notice and or justifiable cause raided the Petitioners premises. The Petitioners state that they are not claiming ownership of the suit property but expect to receive legal protection in regard to their role in protecting the public beach in their capacity as traders as they are important stakeholders of the public beach as they have in past occasions been involved by government agencies in protecting the public facility.

24. This petition is grounded on Articles 29(c), 27(1), 29(a), 40 and 47 of the constitution of Kenya 2010. The Petitioners presented their case as infringement of their right to life, and alleged denial of right to carry on their businesses. Their grievance translates to an alleged infringement of the social economic right. Although it is not cited by the petitioners as one of the fundamental rights violated, it is the economic and social rights under Article 43 of the Constitution that would appear to entitle the Petitioners to protection of opportunity to earn a living and protection of the right to be free from hunger and to social security. The issue then is, why would the 1st Respondent issue the traders on the suit land with licences for their trading businesses and at the same time forcefully evict them without a notice? If this is proved to be true, it could amount to violation of Petitioner's right under Article 43 of the constitution. However, the 1st Respondent states that by the time its officers clobbered and evicted the Petitioners from the premises the Petitioners' licenses had expired and had not been renewed. It is noteworthy that the 1st Respondent does not deny violently evicting the Petitioners. There is no law in this country which allows anybody to violently evict people whose occupational permit have expired. More so, there is no law that allows physical violence or destruction of property of such occupants. The law that this court applies is one which allows an aggrieved person to seek a court order to effect an eviction. Such court order cannot entertain violence on evictees or destruction of their property. I am satisfied that the 1st Respondent violated Petitioner's right to a fair administrative action contrary to Article 47 of the Constitution. It is important to apply fair administrative action to safeguard against highhandedness and abuse of authority by public bodies exercising administrative and quasi-judicial functions.

iii) Whether the Petitioners are entitled to the Special and General Damages Sought

25. The Petitioners submitted that court should award them Kshs. 27,889,950 as damages for loses they suffered. This was supported by Annexed list of names in the Petition where several Petitioners have particularized the loss they suffered as a result of the eviction by the 1st Respondent and its agents. The law is that the claimant is required to lay on the table evidence of damages and losses suffered. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. This was the decision Mwangi *Muriithi (supra)* and *Mumbi M'Nabea vs. David Wachira Civil Appeal No. 299 of 2012*.

26. In *Romauld James v. AGT [2010] UKPC Lord Kerr* at paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said:

“In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated.”

27. The Petitioners in this case neither specifically pleaded nor proved the damages suffered in the alleged eviction. This could have been done by proof of receipts, or photographs after the alleged eviction exercise or any invoices to show that the liquidated losses were incurred as a result of their constitutional violations. Alternatively, the Petitioners could have called *viva voce* evidence of the losses they individually suffered. There was not a little attempt to prove the alleged losses suffered. In this case, I find the particulars lacking and as such I am not able to make any orders with regard to Special and General Damages on account of alleged loses. In the South African Case of *Dendy vs. University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291*, the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

28. Consistent with the above jurisprudence, it seems to me that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a court. However, the court's discretion for award of damages in Constitutional violation cases is limited by what is **“appropriate and just”** according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

29. Consequently, and in deference to above jurisprudence, I find it as a fact that indeed the Petitioners were evicted in violation of their right to fair administrative action, and in the process they needlessly lost property, which ought not to have happened. Although the Petitioners have not proved that their loss amounted to the Kshs. 27,889,950/=, and cannot be compensated for that, this court finds the act of forceful and violent eviction without notice or fair administrative action a violation of the Petitioners' administrative rights under Article 47 of the constitution for which the Petitioners shall be compensated. Further, the grant of such compensation will send a clear message to government agencies who carry out unwarranted and ill conceived and violent evictions in which evictions citizens suffer unnecessary losses, that their unlawful actions shall be heavily punished whenever proved. In this regard therefore, I award a total of Kshs. 25,000,000/= compensation for violent eviction of Petitioners in violation of their administrative action rights under Article 47 of the constitution, and for the unwarranted violence meted on the Petitioners during the said eviction. This Judgment underscores the prudence that even where it is alleged that a person is illegally in occupation of a property, such occupant cannot be violently evicted. The due process of law must be followed. Any such violent eviction, together with all the consequential loss, whenever the same is proved, shall be visited on the violator and aggressor.

Final Orders

30. From the foregoing, the petition partly succeeds, and orders are granted as follows:

- a) A declaration that by virtue of Article 29 (c) of the Constitution of Kenya, the Petitioners are entitled not to be subjected to any form of violence, including that meted out by the 1st Respondent, its servants, and agents on diverse dates between October 2018 and December 2018.
- b) A declaration that by virtue of Article 27(1) of the Constitution of Kenya, the Petitioners are entitled to equal protection and equal benefit of the Law from the caprices and whims of the 1st Respondent, its servants and agents.
- c) A declaration that pursuant to Article of the Constitution of Kenya, the Petitioners are entitled to be afforded fair administrative action by the 1st Respondent, its agents, servants and employees that is lawful, reasonable and procedurally fair and to have been given written reasons prior to the 1st Respondent embarking on the actions meted on the Petitioners on diverse dates between October 2018 and December 2018.
- d) Against the 1st Respondent, general damages amounting to Kshs. 25,000,000/= being compensation for violation of Petitioners' fair administrative action rights under Article 47 of the constitution as stated in paragraph 29 hereinabove.
- e) Costs of this petition to be paid by the 1st Respondent.

31. As for the Cross Petition, the same was mainly premised on unchallenged allegation that the Cross Petitioner was the title holder to the suit premises. That position was not challenged, and indeed the Petitioners replied that they were not claiming ownership of the suit property. Given that the Petitioners do not claim title to the suit premises, and given that their licence to do business in the said premises had expired and was not renewed, the Petitioners have no further interest in the suit property, and are therefore barred from the suit premises unless their licences are renewed by the Cross Petitioner who is the lawful registered proprietor of the suit premises.

32. Accordingly, the Cross Petition is allowed as follows:

- (i) A declaration that title L.R NO. MN/17177 and LR MN/17178 (the suit property), is properly owned by the Cross Petitioner and the Respondents have no rights whatsoever.
- (ii) A declaration that any present and future dealings by the Respondents with L.R NO. MN/17177 and LR MN/17178 is unlawful and unconstitutional.
- (iii) A permanent Injunction restraining the Respondents, its agents, servants, employees, assignees, successors or any person claiming under them from entering and in any other way dealing with the suit property L.R NO. MN/17177 and LR MN/17178.

(iv) Costs of the Cross Petition to be paid by the 1st Respondent.

Dated, Signed and Delivered at Mombasa this 27th day of July, 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Dr. Khaminwa for Petitioners

Mr. Tajbhai for 1st Respondent

Mr. Makuto holding brief Nguyo Wachira for 2nd, 3rd and 4th Respondents

Mr. Kaunda Court Assistant