



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTION PETITION NO. 14 OF 2017

IN THE MATTER OF ARTICLE 2, 3, 6, 10, 19, 21, 22, 25, 26, 27, 28, 29, 35, 37, 47, 48, 50, 165, 186 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26(1), (3), 27(1), (2), 28, 29, (c) (d) 17 OF THE CONSTITUTION AND RULE 11 (C) AND 12 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PRACTICE AND PROCEDURE RULE, 2013 AND ALL OTHER RELEVANT ENABLING POWER AND PROVISIONS OF THE LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

JOHN NTOITI MUGAMBI, EMILY MUTUA K

& ISAIAH MWITI MUNGATHIA officials of THE

ISIOLO STAGE VIEW ENTERPRISES C.B.O

(acting in the interest of its members).....PETITIONERS

AND

ISIOLO COUNTY GOVERNMENT.....1ST RESPONDENT

THE COUNTY COMMISSIONER,

ISIOLO COUNTY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

ELIJAH K. IKUAMBA 1ST INTERESTED PARTY

JOSEPH NGITUYU NKURI.....2ND INTERESTED PARTY

MARTIN R. MURIIGA.....3RD INTERESTED PARTY

MERCY K. KANANA.....4TH INTERESTED PARTY

STELA K. MARANGU.....5TH INTERESTED PARTY

SUSAN MAINGI.....	6 TH INTERESTED PARTY
JAME G. MAINA.....	7 TH INTERESTED PARTY
MARGARET NYOROKA.....	8 TH INTERESTED PARTY
MARGARET THARA.....	9 TH INTERESTED PARTY
NATHAN THAIRU.....	10 TH INTERESTED PARTY
DOBLA IBRAHIM.....	11 TH INTERESTED PARTY
JOSHUA MPEKETHU.....	12 TH INTERESTED PARTY
HABIBA KOTOLA.....	13 TH INTERESTED PARTY
AMINA MALIM.....	14 TH INTERESTED PARTY
JAMES KIGUNDA.....	15 TH INTERESTED PARTY
SILAS RUIMBA.....	16 TH INTERESTED PARTY
YUSUF JIBRIL.....	17 TH INTERESTED PARTY
GRACE KANGAI.....	18 TH INTERESTED PARTY
BRIGIT KATHURE.....	19 TH INTERESTED PARTY
JULIUS MAIKITHE.....	20 TH INTERESTED PARTY
JUDITH MUTHONI.....	21 ST INTERESTED PARTY

JUDGMENT

1. The petitioners are members of the Isiolo stage view traders' enterprises, a Community Based Organization (CBO), who were carrying their business at the market , near the bus park in Isiolo town where they had constructed stalls, kiosks and shops. A legal tussle ensued between the petitioners and the Isiolo county government culminating in the filing of the suit Meru ELC No. 102 of 2015.

2. In that suit petitioners were the plaintiff and they had apparently obtained injunctive orders against the County Government of Isiolo whereby the latter entity was restrained from inter alia demolishing plaintiff's premises or evicting them. All was quiet until 13.9.2017 when petitioners found that their business space/premises had been razed down by fire in the wee hours of the night. The petitioners had then gone to the scene to salvage their property and to reconstruct their stalls. However, they found the place cordoned off by the 1st respondent prompting the filing of this Petition.

3. On 10.10.2017 the case against the 2nd and 3rd respondents was withdrawn leaving the County Government of Isiolo as the only respondent. On the same date, parties through their advocates agreed to have the case no. ELC 102/15 stayed until this petition is finalized.

4. Sometime in November 2018, more parties (21 to be precise) applied to be enjoined in this suit as petitioners and this application was allowed. The petition was canvassed by way of written submissions.

Case for the Petitioners

5. The case for the petitioners is contained in their pleadings and in the affidavits of their secretary Emily Mutua filed on 25.9.2017 and on 10.1.2018.

6. Petitioners aver that they have been in occupation of the suit premises where they have been carrying out business since 1970's. They pay land rent annually and they have licenses for their respective businesses. Some of the members apparently have letters of allotment.

7. On 13.9.2017 their business premises were gutted down by fire and efforts to rebuild their structures were thwarted by the respondents.

8. They aver that infringement of their right to property under article 40 and social economic right of social security under article 43 of the constitution have been trampled upon. They aver that they have a right to earn a living through the small enterprise businesses they were carrying out at the business space as a means of protection of the right to be free from hunger and to social security.

9. The petitioner's right to fair administrative action under article 47 of the constitution was also trampled upon in that they were not consulted or given notice of impending cordoning off their business premises upon the fire gutting it down and neither were they given an alternative place to set up their businesses.

10. Petitioners contend that the move by the respondents to block them from re-building their premises is **“illegal, unconstitutional and unlawful”**.

11. The petitioners therefore seek this court's protection of their rights under articles 20, 21, 22 and 23 of the constitution to protect them from the violation, or threatened or likely violation of their rights.

12. The relief sought by the petitioner is for;

(i) A declaration that the forcible violent and brutal eviction of the petitioners members from their business establishments within the main market within Isiolo county, without according them an alternative designated place to carry on their business, and/or accommodating them within the trade arrangement of the county government is a violation of their fundamental right to life guaranteed by article 2, 3, 6, 10, 21 (1), 22, 23, 25, 26, 27, 35, 36, 37, 40, 43, 47, 48, 50 and 186 of the constitution of Kenya.

(ii) An order for permanent injunction restraining the respondents, their officers, agents or servants, employees and otherwise whosoever from evicting and/or interfering with the petitioner's members from carrying out their business within the main market of Isiolo County without provision of alternative designated places.

(iii) That this Honourable court do make such consequential orders, issue such writs and directions as it deems appropriate to restrain the respondents from interfering with the peaceful carrying of business by the petitioner's members at the space that houses the main stage and the main market within Isiolo County, more particular the county commander of police do carry out the duties under the police Act and for purposes of enforcing or securing the enforcement of any of the provision of the constitution of Kenya.

(iv) Costs of the petition be awarded to the petitioner.

13. In their submissions petitioners have emphasized their right to economic social right as enshrined under article 43 of the constitution. They have also cited article 25 of the universal declaration of Human rights (UNDHR) of 1948 which provides that;

“Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social service, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.

14. It has also been submitted that the Petitioners right to fair administrative action under article 47 of the constitution was trampled upon as they were neither consulted nor were they given a notice of the impending demolitions. On this point, petitioners have cited the case of **Kenya Transporters Association vs The Municipal council of Mombasa and Another, Multiple Hauliers East Africa Ltd vs Attorney General and 10 others (2013) eKLR.**

15. Petitioners submit that their interests are capable of being taken care of by Judicious allocation of trading places in such areas and in such days and times conducive to the achievement and protection of their various interests.

Case for the Respondent

16. The case for the respondent has been advanced by one Dr. Ahmed Galgalo Guyo who is the county secretary of the respondent. He avers that the suit land is a market near the Isiolo bus part. The market was conceived and consent for its construction given by the Isiolo County Council in 1989. It became the policy of the now defunct Isiolo County Council to allow small traders to build temporary structures on the suit land where they would pay occupational rates for the structures and therefore the occupancy was on basis of a licence.

17. The respondent intended to build an integrated bus park and modern market facility in the area. It thus notified the petitioners of its intention through a notice in the Daily Newspaper.

18. Respondent avers that the construction of the modern market is geared towards boosting economic development and is also part of the LAPSET project, a vision 2030 flagship. As such it is a matter of great public and national interest to develop the modern market facilities and integrated bus park as soon as possible to allow economic and social progress of both Isiolo county and the Republic of Kenya.

19. Further the design of the market will take into account sensitive environmental areas and will be done with due regard towards conservation of the natural environment of Isiolo County making its construction important to the future generations of Kenyans as well as the present ones.

20. The construction of the modern bus park and market will also serve the interests of the Defendants as it is one of the first steps towards turning Isiolo County into a trading and commercial hub, a development which will certainly be of benefit to the traders.

21. Respondent avers that it would be a travesty of justice to stop the county government of Isiolo from dealing with property as they deem fit despite having given a notice to their tenants in a Daily Newspaper of National circulation of their intention. It would also be against the

public interest to stop a mega project with far reaching economic, political and social benefits for the nation at large because of the complaints of a few who do not have any right to the property.

22. In its submissions, Respondent avers that it owns the disputed plot. As such, the petitioner's cannot claim that their right to property under article 40 has been violated.

23. It has also been submitted that the construction of the modern market is for the good of the greater public interest. On this point, the case of **Kenya Hotel Properties Ltd vs Willisden Investment & 6 others (2013) eKLR** and **Veronica Njeri Waweru & 4 others vs City Council of Nairobi & 2 others (2012) eKLR** have been cited.

24. Further, Respondent avers that land acquired for a public purpose must be utilized as such. On this point, the cited cases are **Niaz Mohammed Jan Mohamed vs Commissioner for lands and 4 others (1996) eKLR** and the case of **Mureithi & 2 others (for Mbari ya Murathimi clan) vs Attorney General & 5 others (2006) IKLR 443.**

25. Respondents further state that by the time the petition was filed, the petitioners were no longer occupants of the suit land as the structures had been gutted down on 13.9.2017 hence the prayer for a permanent injunction restraining the respondent from evicting them (petitioners) was illogical.

Determination

26. I frame the issues for determination as follows:

(1) Whether any constitutional rights of the petitioners have been violated.

(2) Whether the relief sought can be granted.

Violations of constitutional rights

27. The petitioners claim is that they have an interest in the suit land as that is where they ordinarily eke out a living.

28. Article 23 (1) of the constitution provides that:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review”.

29. **What is the nature of interest that the petitioners have on the suit land?.** Article 40 (1) of the constitution provides that;

***“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
(a) of any description; and (b) in any part of Kenya”.***

30. The applicants do not have titles to the suit land. When the suit was filed, petitioners had no single document concerning their claim to the land. However in the further affidavit of 10.1.2018, petitioners have exhibited some documents of kiosk owners at Isiolo market. EKMI is the list of kiosk owners with regard to temporary land rents, while EMK 2 and 3 are allotment letters for John Ntoiti.

31. Section 26 of the land Registration Act provides that;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner....”

32. In **John Mukora vs Minister for lands and 6 others petition no. 82/2010 (consolidated with others) H.C.C Nairobi (Mumbi Ngugi J)**, it was held that;

“The right to property as recognized in article 40 of the constitution of Kenya 2010 and section 75 of the repealed Kenyan constitution as concerns right to land could only be enjoyed by registered proprietors of land. The petitioners in petition no. 83, 85, 86, 88 and 89 of 2010 only held allotment letters and were not the registered owners of the land that they claimed to own”.

33. It is apparent that whatever interests the petitioners have with regard to the suit land, such interests do not amount to rights of proprietorship capable of being protected under article 40 of the constitution.

34. Lack of a titles however does not mean that such claimants have no interest in land. An interest in land can arise through allotment, customary tenure system like in adjudication, etc.

35. In the case of **Benson Mukuwa Wachira vs the assumption Sisters of Nairobi Court of Appeal Civil Appeal No. 121 of 2006**, it was held that

“The effect of allocation and allotment by the government was to divest the latter of its legal interest in the suit land and to constitute the appellant the new owner thereof”.

36. However the process of surveying and delineation of the land must be carried out for such allocation to have meaningful legal effect.

37. In the present case, the petitioners are quite a number but only the allotment of one person has been exhibited. These are the documents of one John Ntoiti. EKM 2 bears the heading; RE: UNS EXISTING RESIDENTIAL PLOT – ISIOLO TOWNSHIP. This land is un-surveyed and hence the process of delineation had not been carried out. Further it is not clear as to how the plot in EKM 2 was for a residential plot yet the suit land is for business in a market set up. The other allotment document though for a market plot (no.237/16/89) has no terms of allocation i.e. the plot has no area size, lease term etc.

38. Thus even when it comes to allotment, there is no tangible evidence to place these petitioners under protection of article 40 of the constitution.

Economic social rights

39. These rights are provided for under article 43 of the constitution where it is stipulated as follows:

“1. Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education”.

40. Further **Article 21 (2) of the Constitution** provides that;

“The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43”.

41. The respondent has availed a document “IWS” which are the plans of the integrated bus park and modern market. The document is rather comprehensive as it takes into account security features like gates, sanitary conditions (public toilets, sewer lines & drainage), clean water supply and environmental protection.

42. It is only through proper and organized town planning that the state (read Respondent) can achieve progressive realization of the rights guaranteed under article 43. Such economic social development stands to benefit the wider society and not just the petitioners.

43. I am in agreement with Respondent’s submissions that public interests overrides private interests. That is why enjoyment of fundamental rights and freedoms have limitations as stipulated in article 24 of the constitution.

44. An unplanned market town etc. is a ticking time bomb. Sooner, issues of security, environmental degradation, poor sanitary conditions etc are bound to arise. Urban planning must also take into account the principle of intra and intergenerational equity. The petitioners have not given an account of how these issues of a clean and healthy environment and security are to be taken care of if they were to be allowed back in the market.

45. In the case of **John Kamau suing on behalf of Mutindwa self-help group vs City council of Nairobi, and 7 others** the petitioners were claiming that Mutindwa market stands on public utility land held by the 1st respondent on behalf of the people ordinarily residing on the area, that petitioners were conducting their daily business there with full knowledge of the council which was collecting market fees daily. The petitioners had further contended that they had heavily invested their finances and time in that market where they earned a living and some members had even secured financial credit facilities to boost their business. Those Petitioners appear not to have embraced a project (construction of a road) that was being undertaken by the then council. The court had ruled thus; ***“Article 43 makes provision for health care, adequate housing, water sanitation adequate food and education which denote the general wellbeing of every citizen but do not encompass the activities of the petitioners herein. I say so because the subject property was not utilized by the petitioners as an informal***

settlement or for dwelling/living purposes but of business premises.....”.

46. The court went on further to state that; **“Suffice to say that the land in question is a road reserve and the public interest demands that such land should be used for the purposes it is intended and should not be appropriated for private use. The court has also found that the rights of the petitioner cannot override that of the public interest”.**

47. From the foregoing, it is clear that the state, in this case, the Respondent has a constitutional mandate to ensure that the residents including the petitioner’s right to social economic rights are observed, enhanced, protected and fulfilled. This is a progressive process which was clearly initiated by the former town council and which stands to benefit the general public.

48. I have also taken into account the fact that the number of claimants appears to be unknown. In the ELC case no. 102/15, the claimant were 86 (see EMK 4 – an order). In this Petition, paragraph 12, reference is made to hundreds of claimants. Petitioners submissions mention more than 180 claimants, the further affidavit of the petitioners make reference to over 500 people, whereas EKM 1 (the updated list of kiosk owners) has a list of 296 claimants. It is also not lost to this court that a group of 21 people joined this petition at the tail end of the trial. With such an amorphous group, it would certainly be extremely difficult to grant the prayers sought herein. How would the claimants be identified? Who would get which part of the land? It is not lost to this court that even the actual acreage of the disputed plot is not clear.

49. A court of law ought to give orders which are capable of being enforced and not orders which would elicit absurdity. In the instant case, a problem of enforcement would surely arise seeing that it would be like a free for all scenario.

50. Finally, the petitioners have claimed violation of their rights under article 47 of the constitution in that they were not consulted and were not given a notice.

51. Article 47 of the constitution provides that;

“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”.

52. The court has looked at the circumstances under which the petition was filed. The petition was filed after the incident of 13.9.2017 where fire gutted down the business premises of the petitioners. It appears that the petitioners were carrying on business on the strength of a court order issued in ELC 102/2015. It follows that the issue of eviction had risen before the filing of ELC 102/2015. It also follows that the issue of eviction ought to be dealt with in the earlier suit so that evidence is tendered. For instance, the respondent has stated that a notice was duly issued through a daily newspaper, an averment not rebutted by the petitioners. The full particulars regarding the issuance of such a notice, why the notice was given etc are better dealt with in a trial where evidence will be subjected to cross examination.

53. I find no basis of making a determination that petitioner’s rights to fair administration action were violated.

54. All in all I find that this is a situation whereby the petitioners ought to explore harmonious engagement with the respondent in a structured manner so as to fit in the new modernized market.

55. I find that the petition is not merited. The same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20TH FEBRUARY, 2019

IN THE PRESENCE OF:-

C/A: Kananu

Kurauka holding brief for Gichuru for petitioners

Miss Munga for the interested parties

Emily Mutua Secretary Stage View

Isaiah Mwiti Treasurer Stage View

HON. LUCY. N. MBUGUA

ELC JUDGE