



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 4 OF 2016

IN THE MATTER OF ARTICLES 19(1), 20(1) & (2), 21(1), 22(1) & (2a), 23(1) AND 165(3b)

OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(4), 10, 24(1), 27(1) 46(1)(a) & (c) & (f) AND 196(b)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, BILL OF RIGHTS CHAPTER FOUR, CHAPTER TWO, CHAPTER ONE AND CHAPTER ELEVEN

AND

IN THE MATTER OF SECTION 87 AND 96 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

BETWEEN

HARRISON MASAI NGOVI & 190 OTHERS.....PETITIONERS

VERSUS

THE COUNTY GOVERNMENT OF KITUI.....RESPONDENT

J U D G M E N T

1. The Petitioners, **Kathungi Market Traders** are hawkers, small scale traders, traders in farm produce, livestock traders, business people and entrepreneurs of **Kitui** who carry on business at **Kathungi Market**.
2. The Respondent is the **County Government of Kitui** that has a mandatory obligation to safeguard, uphold and protect the rights of citizens under the Bill of Rights and any other law as provided by the Constitution.
3. The Petitioner's case is that prior to their migration to **Kathungi Market** they were operating on Tuesdays at **Katulani Market** within Kitui County, places that are five (5) kilometers apart. The decision to migrate was a result of actions of the County Government of Kitui that left the Petitioner's market stalls and other set up structures destroyed, all in the name of developing proper and standard market structures for the traders. Aggrieved by actions of the County Government of Kitui which did not compensate them for the destroyed properties, they vacated the market in search of greener pastures.
4. The parties discussed before the Chief, **Kathungi** and agreed on tax payable on market days. They were to trade on Tuesdays and pay **Kshs. 30/=** which was an increase of **50%** as they used to pay **Kshs. 20/=**. The Respondent undertook to have the day legalized under the law and to have it gazetted.
5. On the **2nd August, 2016**, the Petitioners wrote a letter addressed to the Governor of the County, the Speaker of the County Assembly, the Secretary of Kitui and County Trade, Industry, ICT and Co-operatives, copied to the County Commissioner Katulani, OCPD Katulani, all Chiefs Mulango and **Mr. Masai**, Chairman of the Hawkers Association notifying the Respondent of their intention to disobey the Public Notice (directive) for being illegal and unconstitutional.

6. On the 2nd August, 2016 the Petitioners who had reported to **Kathungi Market** to operate business during the market day were ordered to leave the market with their trading items at **9.00 a.m.** Getting Public Transport upon which they relied was not easy. As a result the Respondent's officers confiscated both perishable and imperishable goods that belonged to the Petitioners. They argued that the directive of the Respondents was aimed at denying the Petitioner the opportunity to earn a living like other traders in other markets within the County which is in violation of the constitution.

7. Therefore they sought the following reliefs:

“1. A declaration that the directive issued by the Respondent against the Petitioners is unconstitutional and contravenes the constitution as provided for under Article 2(4) and is against the national values and principles of governance as stipulated under Article 10 of the constitution.

2. A declaration that the failure by the Respondent to perform the duty of respecting, observing, promoting, protecting and fulfilling the rights and fundamental freedoms in the bill of rights is a violation of the Petitioners' fundamental right to protection by the state as provided for under Article 21(1) of the Constitution.

3. A declaration that the deliberate exclusion of the Petitioners by Respondent from participating in free, active and progressive business trading activities at Kathungi market is unlawful and amounts to discrimination and is a violation of Article 27(1) of the Constitution.

4. A declaration that the law passed by the Respondent declaring illegal operation of business activities at Kathungi Market is a violation of the rights of consumers as provided for under Article 46 of the constitution.

5. A declaration that the restriction imposed by the Respondent on the Petitioners to refrain from conducting any business activities on Tuesdays at Kathungi violates economic and social rights under Article 43 and also children's rights under Article 53 of the constitution.

6. A declaration that the Petitioners right to public participation has been violated as enshrined in Article 174 and 196 of the constitution.

7. A declaration that actions by the Respondent against the Petitioners before replying to the letter written by the Petitioners and giving no reasons for the actions therefore is a violation of the Petitioners' right to fair administrative action contrary to Article 47(1) of the Constitution.

8. A consequential order prohibiting the Respondent from taking any action or undertaking any process whether administrative or otherwise that excludes or precludes the Petitioners from conducting their business activities on Tuesday of every week at Kathungi Market.

9. An order for the compensation of the Petitioners by the Respondent on the destruction of their market stalls and structures and the returning of the goods taken away by the police.

10. An order for general and exemplary damages against the Respondent for violation of the Petitioners' fundamental Rights and Freedoms under the Constitution of Kenya, 2010.

11. An order that the costs consequent upon this Petition be borne by the Respondent.

12. Such further orders as this Honourable Court shall deem just in the circumstances.”

8. The Respondent filed grounds of opposition to the Petition where it stated that the Petitioners are attempting to cause chaos in the County market days by illegally changing the market day for **Kathungi Market** from Saturday to Tuesday which will conflict with the nearby **Katulani Market** that holds its market day on Tuesdays; That days when various market centers have their market days were agreed upon by the public and debated and passed into law by the County Assembly of Kitui which has representatives of all electoral wards in Kitui County and that granting orders sought will cause anarchy and lead to the County Government of Kitui to lose essential revenue.

9. It was further averred that all market centers are regulated under the Kitui County Markets and Fresh Produce Act of 2014 which was passed by the County Assembly of Kitui after full public participation; an Act that adopted the same market days for all centers as previously established under the Local Government Act (Now Repealed). Both **Kathungi Market** and **Katulani Market Centers** are within **Mulango Ward of Kitui County** within a radius of 4 kilometers and their gazetted market days are Saturday and Tuesday respectively.

10. That in **February, 2016** the Respondent undertook construction of market sheds for **Katulani Market** which took four (4) months to complete and during that period, **Katulani Market** was temporarily closed and market activities relocated to **Kathungi Market**. Upon completion of the sheds **Katulani Market** was re-opened and continued operating on Tuesdays as it were the case before. Revenue at **Katungi** and **Katulani Markets** is collected by the same market attendants hence allowing both markets to operate on the same day will lead to loss of revenue by the Respondent which will lead to anarchy and loss of economic sabotage and that the notice was issued after the Business Community of Katulani Market duly petitioned the Minister for Trade and Industry, Kitui County.

11. Directions were given in the matter where the Petition was to be disposed of by way of written submissions. Only the Respondent's Counsel filed submissions where he stated that under the **Kitui County Market and Produce Act 2014**, it is the duty of the County Government to establish market days for various market centers within Kitui County. The rationale being to ensure that there is order in the

manner citizens carry out business which enables the County Government Revenue Personnel to effectively collect revenue. That the law was passed after intense public participation and scrutiny. Other than violating the rights of citizens the Act maintains order in the business environment. That the gazetted days are for open markets but all other days of the week are normal trading days in the respective markets except the open market which remain closed.

12. It is averred that the Respondent has violated **Article 2(4)** of the **Constitution** by passing and implementing a law that restricts the Petitioners from conducting their normal business. The alluded to provision of the law provides thus:

“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

That provision of law upholds the supremacy of the Constitution that binds people. Any law that is inconsistent with the Constitution is void to the extent of the inconsistency. The sovereignty of the Republic of Kenya is founded in values espoused in **Article 10** of the **Constitution** that provides thus:

“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability;

and

(d) sustainable development.”

13. The Petitioners averred that the Respondents imposed an illegal law on the Petitioners which undermines **Article 24** of the **Constitution** that provides thus:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37— Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.”

14. The Petitioners were duty bound to demonstrate how the Respondent discriminated against them and as a result they were denied the opportunity to operate their business appropriately as a result of the law that was passed which they viewed as illegal.

15. It is admitted that the **Kitui County Market and Produce Act, 2014** was enacted. The Act establishes a County Directorate of Trade and Markets that has the duty of administering laws relating to fair trading, maintain, regulate and manage markets. Commercial activities that are carried out in open air markets are also regulated as provided by the law. Traders must obtain licenses.

16. The alleged illegal law that came into force on the **19th November, 2014** having been passed into law by the representatives of the Petitioners in the County Assembly, on implementation of the law open-air markets were to operate on days gazetted. Regular traders are licenced to operate businesses but when they want to trade in open-air markets they must obtain a licence.

17. Regarding the impugned notice, it is stated and not repudiated that it was issued after traders from **Katulani Market** petitioned the Minister for Trade and Industry to ensure that both markets were regulated.

18. Therefore what transpired was in compliance with the law that is in operation.

19. In the premises the allegations set out by the Petitioners that are unsubstantiated by the Petitioners are baseless. In the result, the Petition fails and is dismissed with no orders as to costs.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 30th day of May, 2018.

L. N. MUTENDE

JUDGE