



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 64 OF 2015

In the matter of Articles 1, 2, 22, 27, 40, 46 and 47 of the constitution of Kenya, 2010

And

In the matter of Articles 165 (3) and (6) of the Constitution of Kenya, 2010

And

In the matter of alleged contravention of Article 174, 175, 184, 196 and 232 of the constitution of Kenya 2010

BETWEEN

- Liwell Mwangi Kahwai.....1st Petitioner**
- James Ongaki.....2nd Petitioner**
- Rosemary Wanjiru Gituhiu.....3rd Petitioner**
- Benjamin Mutuku.....4th Petitioner**
- Lydia Muthoni.....5th Petitioner**
- Hellen Nyandiko.....6th Petitioner**
- Peter Maina.....7th Petitioner**
- Jackline Katulu.....8th Petitioner**
- Bradina Igoki Mungania.....9th Petitioner**

(All for themselves and on behalf of Makongeni Traders Thika Sub-County, Kiambu County)

and

JUDGEMENT

The petitioners have instituted this suit on their behalf and on behalf of traders in Makongeni estate in Thika Sub-County of Kiambu County and that they have been conducting lawful businesses and paying the requisite fees and that the Thika Municipal Council has approved some of their structures. It is averred that on 20 February 2015 some traders were served with notices to remove their structures, which notice the petitioner claim was issued unlawfully and in violation of their fundamental rights in that the traders affected have single permits, that the notice did not specify the premises to be removed, that the notice was short, discriminative and violates provisions of the constitution and also infringes the County Governments Act[1] and Urban Cities Act.[2]

It is also averred that the Respondent has not offered alternative relocation to the affected traders and that it has no regard to the economic and social liberty of the petitioners. The petitioners seek orders that forceful evictions would be unconstitutional and also restraining orders stopping the evictions until "public participation is done."

Respondents case

In a Replying affidavit filed on 5 March 2015, sworn by Hannah N. Maranga, the Respondent states *inter alia* that the Respondent served notices for removal of structures build on a road reserve and public utility land, that the structures offend the provisions of the Physical Planning Act, that the petitioners have erected dangerous Kiosks around Madaraka Market and other designated market places thereby competing unfairly with *bona fide* occupants of the legitimate market stall who are equally entitled to livelihood. It is also averred that there are numerous complaints of insecurity, lack of sanitation, blocking entrances to existing structures including blocking emergency services like ambulance and fire, poor drainage, blocking service lanes. Further, initial licenses were accompanied by type-plans but over time the petitioners reproduced letters and sold them to unsuspecting petty traders leading to sprawl of Kiosks outside the designated areas and that the petitioners are attempting to clothe their illegal and immoral conduct with constitutionalism and that it will be impossible to maintain law and order if such illegal encroachment is allowed on public roads and public utility land.

Petitioners Replying Affidavit

In a Replying affidavit filed on 13 March 2015, the petitioners denied the above allegations and averred that their structures are not illegal, that the structures have been in existence since 1992.

Petitioners Advocates submissions

Counsel for the petitioners submitted that the notice served upon the petitioners did not take into account basic constitutional provision and violated several provisions of the constitution, international obligations and cited two High court decisions, namely *William Musembi & Others vs Moi Education Centre*[3] and *Micro and Small Enterprises Association vs Mombasa County Govt & Others*. [4]

Respondents submissions

Counsel submitted that the petitioners lack proprietary interests in the land, hence they cannot enjoy constitutional protection and cited the decision in *Njuguna Peter Kinyagia vs The county Government of Kiambu*[5] and *Niaz Mohsmed vs Commissioner of Lands*[6] and that the petitioners also filed yet another suit in court being Civil suit No. 199 of 2015 at the Thika Chief Magistrates Court and pointed out that some of the annexures to the petitioners affidavit are documents issued to persons who are not parties to this suit.

Expert reports

On 1st February 2016 Justice Ngugi ordered the parties to engage experts in physical planning to visit the grounds and file reports indicating the location of the petitioners premises in relation to road reserves and public utilities such as sewer lines and power lines among other services.

Pursuant to the said order on 20 June 2016, a report duly signed by the Sub-County Planner, Thika was filed in court. The report states inter alia that the Kiosk owners never sought planning approval from the planning authority, that "their placement is wanting as they are sporadic and haphazardly placed and seem to be swallowing up the once well planned residential neighbourhood" and that the Kiosks are on the road reserve where the secondary power lines are located and that the Kiosks have resulted to interfering with both the vehicular and pedestrian traffic and pose a danger to the vendors and buyers and that the Kiosks on road reserves are encroaching on the main carriage way thus impeding the flow of traffic.

Determination

The above report is fairly illuminating in that it demonstrates the danger posed by the structures in question. It confirms that the structures are not approved as required. This means that the structures are illegal. The rights claimed by the petitioners are not absolute, but fall under the category of rights that can be limited under justifiable conditions such as public interest considerations among them the need to ensure order in the city streets. Granting licences or permission to operate in the city's open spaces is the mandate of the County Government and this court will be reluctant to interfere with such mandate unless it is shown that the person in question acted in excess of his legal authority or violated the law or that the decision complained of is unreasonable and unjustifiable in the circumstances.

I am not persuaded that the Respondents breached the law in any manner in issuing the notices in question. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement^[7] and the nature and extent of the injury suffered (if any).

In my view the petitioners have failed to discharge the burden of prove to the required standard. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*^[8] remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britstone Pte Ltd vs Smith & Associates Far East Ltd*^[9] :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses..

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by both parties and I find that the Petitioners have failed to prove the alleged violation to the required standard. On the whole, I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondent.

Orders accordingly.

Dated at Nairobi this 27th day of **March** 2017

John M. Mativo

Judge

[1] Act No. 17 of 2012

[2] Act No. 13 of 2011

[3][3] Petition no. 264 of 2013

[4] Pet No 3 of 2014

[5] Pet No. 687 of 2007

[6]{1996}eKLR

[7] See John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007

[8] {1955} 1 WLR 948 at 955

[9]{2007} 4 SLR (R) 855 at 59