



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 533 OF 2014

EVANSON GACHOKA KAMAU.....1ST PETITIONER
GICHERU KAMBO.....2ND PETITIONER
JAMES J MWIHIA.....3RD PETITIONER
MERCY W. KARANJA.....4TH PETITIONER
KENNETH NDUNGI NDUATI.....5TH PETITIONER
CAROLINE N GOIRI NJENGA.....6TH PETITIONER
PAUL NJIRAINI.....7TH PETITIONER
KAMAU MWATHA.....8TH PETITIONER
GEOFFREY G KAMAU.....9TH PETITIONER

VERSUS

THE CABINET SECRETARY ROADS
AND INFRASTRUCTURE.....1ST RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioners filed the present petition under certificate of urgency on the 3rd of November 2014 seeking to stop the construction of the Nairobi Southern Bypass at Kikuyu Town on the basis that it was affecting their business and causing inconvenience in access and egress to and from the town. The petitioners were directed to serve the respondents for hearing on 7th November 2014.

2. The application was opposed by the 2nd respondent who noted that stopping the construction would lead to escalated costs of the project, which had been ongoing for some time, a fact that was known to the petitioners, but who had chosen not to approach the court in good time. Upon considering the respective submissions of the parties and the documents then on the Court record, I declined to issue interim orders to stop the construction of the bypass. This was on the basis that the core of the petition was that the petitioners' businesses may suffer if the bypass was constructed as intended, and that the entry that the respondents had availed was not convenient.
3. It was the view of the Court that the business and convenience of the petitioners was not sufficient to warrant the interruption of a major public infrastructure project such as the Southern by-pass. Such losses as they would incur could be compensated in damages. I therefore directed the respondents to file their responses to the petition and for the parties to file their submissions.
4. Thereafter, the parties indicated that they were pursuing negotiations with a view to an amicable settlement, which ultimately did not materialize. The parties then requested the Court to rely on submissions filed in court in rendering its decision on the matter.

The Petition

5. In their Amended Petition dated 10th November 2014, the petitioners seek the following orders:
 1. ***A declaration that the new plan and design of the Southern bypass that blocks the old and original entry into Kikuyu town at Makutano is unlawful.***
 2. ***A declaration that the manner in which the new design of the southern bypass at Kikuyu town was formulated for failure to involve the stakeholders.***
 3. ***An order directing the respondents to redesign the Southern bypass as originally envisaged with a direct access road to Kikuyu town at "Makutano"***
 4. ***An order directing the respondents to involve the petitioners and other stakeholders in designing the road at Kikuyu, particularly at "Makutano".***
 5. ***An order directing the respondent to utilize the land that was acquired for the construction of the Southern By pass as was initially intended.***
 6. ***An order directing the respondents to redesign the Southern bypass and access roads at Kikuyu in a way that facilitates business, industry and easy movement of human and vehicular traffic and avoids Traffic jams.***
 7. ***Costs of this petition be met by the respondents.***

The Petitioners' Case

6. The petitioners case is set out in the Amended Petition and the affidavit in support of the initial petition sworn on 31st October 2014 by Mr. Evanson Gachoka Kamau. While Counsel for the petitioners indicated to the Court on 16th November 2015 that he had filed submissions on behalf of the petitioners which he wished to rely on entirely, there were no submissions for the petitioners on the Court record, and none were availed by Counsel for the petitioners despite reminders by the time the Court rendered this judgment. The petitioners' case is therefore based on the petition and the depositions of the 1st petitioner.
7. The petitioners are aggrieved by the road design of the Southern bypass as it enters Kikuyu Town. They argue that the initial plan was for the bypass to serve Kikuyu town through a slip road at a place called Makutano, and land was compulsorily acquired for this purposes. They contend that

instead of following the initial plans, the 2nd respondent altered the plans without involving the residents, the business community or other stakeholders. They complain that the only slip road that was to join the Southern bypass to the heart of Kikuyu Town has been blocked, and they term the town as now “landlocked” which cannot now be accessed through any direct entry. They also assert that neither customers nor suppliers can access their businesses or industries.

8. The petitioners also complain that a bridge into the town is totally inadequate and inconvenient as it takes motorists into the newly created bus and matatu stage, thus creating endless traffic jams and making Kikuyu town an unfavourable business, residential or investment location, and investors and industries may be forced to relocate as a result, thereby affecting the livelihoods of thousands of Kikuyu residents.

The 1st and 3rd Respondent’s Case

9. The 1st and 3rd respondents oppose the petition and have filed an affidavit in reply sworn on 30th June 2015 by Eng. John Kipng’etich Mosonik and Grounds of Opposition dated 13th January 2015.
10. In their Grounds of Opposition, the respondents argue, first, that the petitioners lack authority to bring this petition on behalf of other residents and business persons of Kikuyu Township and Kikuyu sub-county. They contend, further, that the petition cannot be maintained under Articles 22 and 23 of the Constitution under which it has been brought, and neither is there a cause of action disclosed against the 1st and 3rd respondents.
11. It is their argument, further, that the petitioners failed to utilize the numerous statutory mechanisms available to them at the planning stage of the Nairobi Southern bypass project to address the allegations raised in the petition, and in their view, the petition is an abuse and waste of judicial process and time.
12. The respondents further argue that there is no clear breach of the petitioners’ fundamental rights made out; the provisions of the Constitution contravened or threatened with contravention, or the manner of such contravention, have not been pleaded, and the petition therefore does not meet the requirements of a constitutional petition.
13. The respondents further argue that the construction of the Nairobi Southern bypass is a matter of great national importance for the greater good and it therefore overrides the fundamental rights and freedoms of the petitioners.
14. In his affidavit, Mr. Mosonik, the Principal Secretary, for Infrastructure in the Ministry of Transport and Infrastructure, avers that the petitioners’ case is based, inter alia, on a misplaced apprehension of the design of a section of the Nairobi Southern bypass at Kikuyu town, and their contention that they were not consulted at the designing stage.
15. Mr. Mosonik makes further averments with regard to the Southern bypass: that it was mooted to improve the efficiency and competitiveness of the road network known as the northern corridor; and that it is designed to achieve a very high level of service and consequently there is no provision for direct access to the bypass in order to maintain the high degree of safety and mobility. He also gives various details regarding the route of the bypass as well as the convenience that it offers to motorists, which are not relevant for present purposes.
16. According to Mr. Mosonik, the preliminary design of the bypass which allowed for direct access junction designs was conceptualised in the year 1991, 25 years ago, and it included a single carriageway designed as a rural/urban road. It therefore became necessary to redesign the bypass in order to serve both the current and future socio-economic conditions.

17. It is the respondents' case that the public, in particular the residents and traders of Kikuyu town individually as well as the petitioners' association known as 'Kikuyu Township Stakeholders Committee', were involved in discussions of the design change. Mr. Mosonik therefore termed as insincere and a misrepresentation of the facts the averments of the 1st petitioner, who is the chairman of the said association, in his affidavit sworn on 31st October 2014.
18. Mr. Mosonik avers that following the petitioners' letter dated 15th October 2014 which raised all the issues now raised in the instant petition, the respondents convened a meeting on 24th October 2014 in order to sufficiently respond to the said issues. It was his deposition that the meeting was attended by, amongst others, members of the petitioners' association including the 1st petitioner. The respondents have annexed copies of the minutes of the meeting of 24th October 2014 held at the at Kikuyu Sub-County Town Hall.
19. It is also his deposition that the respondents had, prior to that meeting, convened numerous other meetings with the public as part of public involvement in the design change of the bypass. He enumerates such meetings as including one held on 8th October 2012 and a second meeting which explained the change of design held on 25th February 2013 at the Kikuyu Town Council office.
20. The respondents have also enumerated the challenges that would be encountered should an attempt have been made to provide for access to Kikuyu town as the petitioners demanded. It was their deposition that all possible design options had already been evaluated before settling for the current design. There would have been a challenge with an interchange due to the presence of a railway bridge, and a drainage challenge would also have resulted.
21. The respondents aver further that the bypass was designed as a 'freeway', devoid of any direct access roads, to and from the bypass to allow unhindered flow of traffic along the road. In their view, considering that the entire 28.6 kilometres of the road crosses about ten towns and town centres without direct accesses, it would be discriminative to make an exception only for Kikuyu town.

The 2nd Respondent's Case

22. The 2nd respondent filed an affidavit sworn on 5th November 2014 by Eng. Paul Omondi, who describes himself as the Manager-East Africa Trade and Transport Facilitation Project (EATTFP) in the Special Projects Department at the Kenya National Highways Authority, the 2nd respondent.
23. In this capacity, Eng. Omondi states that he was responsible for overseeing the implementation of the Southern bypass project on behalf of the 2nd respondent, and the works were, at the time of his deposition, at an advanced stage.
24. Mr. Omondi also gives a history of the Southern bypass and its importance for the through traffic coming from the general direction of Mombasa and the then newly built Jomo Kenyatta International Airport. He also avers that it was designed as a free way devoid of any direct access roads to and from the bypass.
25. Mr. Omondi deposes that the matters pleaded by the petitioners as the basis for their petition are based on misinformation, misconception or are otherwise outright misrepresentations of the facts.
26. Mr. Omondi agrees with the averments by Mr. Mosonik that the initial plans for the bypass were drawn in 1991, and that the design was for a single carriageway. Subsequently, and following the increase in traffic, a decision was made to change the road design from single to dual carriageway. He deposes further that the National Environment Management Authority in accordance with regulation 21 of the Environment (Impact Assessment and Audit) Regulations carried a notice in the Kenya Gazette issue of 10th September 2010 advising that it had received an environmental impact assessment report for the implementation of the proposed Nairobi Southern bypass Project.

The notice called for all parties with interest in the project to make their representations within thirty (30) days of the publication of the Notice.

27. It is his deposition that project implementation was approved by the National Environment Management Authority, and it therefore met the guidelines set out for a project of this magnitude in accordance with the provisions of the Environmental Management and Co-ordination Act, No. 8 of 1999. Mr. Omondi has produced before the Court a copy of the relevant portion of the Environmental and Social Impact Assessment Study Report in respect of the project.
28. It is his further deposition, in reliance on the Environmental and Social Impact Assessment Study Report, that there were several meetings with stakeholders in the areas affected, which he enumerates, and which include the meetings with the District Officers, local area chiefs and assistant chiefs in Kikuyu Town, Gitaru, Thogoto, Wilson Airport and Mugumoini.
29. He states that public barazas were also held with the residents of areas affected. With respect to Kikuyu, Mr. Omondi avers that a meeting was held on 8th December 2012 specifically to address, among other things, the issue of the design of the bypass as it passed through Kikuyu town. A further meeting convened by the 2nd respondent was also held at Kikuyu on 25th February 2014 to review the design with the Kikuyu Municipal Council.
30. The 2nd respondent therefore avers that there was sufficient public consultation between its officers, the main contractor and residents of Kikuyu town. He asserts in particular that there is sufficient access to Kikuyu town, the entrance thereto having been shifted by only some 500 metres. He therefore terms the petition as one devoid of merit that should be dismissed.

Determination

31. If I may begin my analysis of the issues raised in this petition by stating the obvious, this is a constitutional petition alleging violation of constitutional rights. Consequently, the petitioners have an obligation to demonstrate, with a reasonable degree of precision, the constitutional provisions violated, and the manner of violation with respect to them. This is the gist of the holding in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** and **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others – Civil Appeal No. 290 of 2012**.
32. However, as the High Court observed in **Trusted Society of Human Rights Alliance vs Mumo Matemu and Another High Court Petition No. 229 of 2012**:

[43.] "The Respondents and the Interested Party, however, make the further argument that the Petitioner has not properly invoked the jurisdiction of the Court because the Petitioner did not frame its case with "reasonable precision." This harkens to the rule of law enunciated in the famous case of Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272 and its progeny to the effect that a constitutional petition must state, with reasonable precision, the provisions of the Constitution which are alleged to have been contravened and the manner in which they are infringed. In that case, Justices Trevelyan and Hancox stated that:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

....

[46.] We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional

infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

33. Further, as was recently observed in **High Court Petition No. 230 of 2015 (Consolidated) Eng. Michael Sistu Mwaura Kamau & Others vs The Ethics and Anti-corruption Commission & Others:**

“On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is our view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant or petitioner ought to set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss an application merely because these requirements are not adhered to would in our view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”

See Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.

34. I am therefore satisfied that it is in order to consider the issues raised in the petition.

35. A second preliminary observation relates to the duty and jurisdiction of the Court in a petition alleging violation of constitutional rights. Once a party has established a violation of his or her rights, it is the duty of the Court to grant appropriate relief, under Article 23 of the Constitution. It is not the duty of the Court, however, to enter into technical issues that are outside its remit. This, I believe, is the crux of the view expressed by the Court of Appeal in the case of **West Kenya**

Sugar Company Limited vs Kenya Sugar Board and another [2014] eKLR relied on by the AG, when it stated:

[38] “The High Court was ill equipped to decide whether or not the conditions for granting a licence had been met; some of the information provided in the application for a licence was of a technical nature. Condition stipulated in section 15(1) (b) of the Act refers to technical experience and capacity. Those factors could only have been properly evaluated by persons well versed in matters pertaining to sugar industry and the application of the policy of the Act. The factors that the High Court took into consideration were some of the matters that the KSB could have taken into consideration in dealing with the applicant for a licence or could have been considered in subsequent proceedings had KSB considered and rejected the application.

From the foregoing we are satisfied that KSB had not abused the power of licensing and that the High Court made a fundamental jurisdictional error of law by usurping the licensing discretion of the licensing authority and substituting it with its own decision. It had no jurisdiction to do so.....”

36. As I understand the petitioners’ case, they are dissatisfied with the road design of the Southern bypass as it enters Kikuyu town. They want the bypass to follow the original design under which the bypass was to serve Kikuyu town through a slip road at a place called Makutano. They see the design that was used as inconvenient and therefore likely to affect businesses in the town. They are also unhappy that land was compulsorily acquired for the purposes of the bypass entry at Kikuyu town, but was not used as intended. The petitioners are also unhappy about what they term as lack of consultation of the residents by the 2nd respondent in altering the design of the road.
37. The petitioners’ grievances give rise to several questions: what is the constitutional violation demonstrated in this matter? Is it a violation of Article 40, in respect to ownership of land? Is it in respect of Article 43, in respect to right to a livelihood encompassed in the social economic rights?
38. None of these constitutional considerations is evident even from the orders sought by the petitioners. To recap, the petitioners want the Court to issue a declaration that the new plan and design of the Southern bypass that blocks the old and original entry into Kikuyu town at Makutano is unlawful; to declare that the manner of formulation of the new design is unlawful for failure to involve stakeholders; an order directing the respondents to redesign the Southern bypass as originally envisaged with a direct access road to Kikuyu town at Makutano, and an order to direct the respondents to involve the petitioners and other stakeholders in designing the road at Kikuyu, particularly at “Makutano”.
39. The petitioners also want an order to compel the respondents to utilise the land that was acquired for the construction of the Southern bypass as was initially intended.
40. I have considered the pleadings of the parties, and I must state that I am unable to discern from the petitioners’ pleadings a cause of action that lends itself to adjudication of this Court, save one. That is the question of public participation with respect to the project.
41. With respect to directing the respondents to redesign the bypass at Kikuyu, two considerations militate against such an order. First, the High Court is not technically competent to make such an order, and since no nexus has been drawn between the prayer and any of the rights of the petitioners, the Court has no basis for even considering issuing it. More importantly, no technical expertise in the form of a report or evidence from an expert in the area of road design was placed before the Court to show that the design by the respondents in any way violated the rights of the petitioners.

42. Further, the Court has the depositions from the engineers for the respondents, Engineers Musonik and Omondi, which depositions have not been controverted. These depositions explain the reasoning behind the change of design, from one arrived at in 1991 to the changes necessitated by socio-economic considerations in the quarter century gap between the initial design and the implementation of the project.
43. The Court takes the view that it can only properly intervene in a matter such as this first, if the requirements for public participation under Article 10 had not been complied with and secondly, if the public interest considerations would require such intervention. In this case, I note from the pleadings of the respondents that there was considerable public involvement, including by the petitioners, in the design changes to the bypass at Kikuyu.
44. I have considered the correspondence and minutes of meetings on the project, and I am satisfied that the requirements of public participation under the Constitution were met. In this regard, I note the deposition that a notice pursuant to the Environmental Management and Co-ordination Act was published in 2010 inviting persons affected by the implementation of the project to send in objections; that an Environmental and Social Impact Assessment Study Report was done; that several meetings were held with residents, the business community and other stakeholders in the areas affected by the project, among which were the meetings of 8th October 2012, 25th February 2013, and 24th October 2014.
45. In my view, such meetings met the requirements of public participation, for such participation does not require that the views expressed by the public be taken on board, but that, as stated by the Court in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi Government and 3 others, Petition No 486 of 2013**, a reasonable opportunity is afforded to residents to present their views. In that case, the Court stated as follows:

[47]“Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say.””

46. With regard to this petition and bearing in mind the technical nature of the matter at issue, I am satisfied that the respondents did what was required of them with respect to public participation and consultation. In my view, a project of the magnitude involved in this case cannot be interfered with simply because some residents deem it inconvenient.
47. The petitioners have also asked for orders to compel the respondents to utilise the land that was compulsorily acquired at Kikuyu for the purposes of the road design at Kikuyu town. The response from the respondents is that the land is no longer required for that purpose, but will remain public land and will be used for some other public purpose such as expansion of the bus park.
48. In my view, this issue is not a matter of concern for this Court. I am not persuaded that there is any violation, either of the Constitution or of any law, in the respondents acquiring land and then not using it if they find that their designs and plans do not require it. Certainly, since the land did not belong to the petitioners, they cannot have any basis for complaining that it is not used for the intended purposes, though they may have a claim in the interests of the public should the respondents purport to convert it for a private purpose.

49. In the circumstances, it is my finding that there is no merit in this petition. It is therefore dismissed, but with no order as to costs.

Dated, and Signed at Nairobi this 16th Day of March 2016.

MUMBI NGUGI

JUDGE

Dated, delivered and signed at Nairobi this 17th day of March 2016

J.L. ONGUTO

JUDGE

Mr. Njuguna instructed by the firm of Kiarie Njuguna & Co. Advocates for petitioners.

Mr. Kamunya instructed by the State Law Office for the 1st and 3rd respondent.

Mr. Onyango instructed by the firm of Orego and Odhiambo & Co. Advocates for the 2nd respondent.