



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 384 OF 2016**

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 10,19,20, 21,22,23,43,46,47 OF  
THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE ACT**

**BETWEEN**

**EASTLEIGH HAWKERS ASSOCIATION.....PETITIONER**

**AND**

**NAIROBI CITY COUNTY .....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**EASTLEIGH BUSINESS DISTRICT ASSOCIATION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Vide a notice of motion dated 15<sup>th</sup> September 2016 and filed in court on 15<sup>th</sup> September 2016, the petitioner herein Eastleigh Hawkers Association, being a duly registered society under the Societies Act Cap 108 Laws of Kenya vide their Certificate of Registration No. 453673 dated 24<sup>th</sup> July 2014 seek from this court against the respondents Nairobi City County, Inspector General of Police and Eastleigh Business District Association orders that:

1. Spent

2. An interim order of injunction do issue against the respondents jointly and severally restraining them whether by themselves, their servants or agents, or howsoever from evicting, restraining and otherwise forbidding members of the petition from carrying on their business as hawkers off 1<sup>st</sup> Avenue and 2<sup>nd</sup> Avenue ( the designated area) of Eastleigh Central Business District until interpartes hearing this application.

3. That an order of injunction do issue against the respondents jointly and severally restraining the respondent by themselves, their servants or agents, or howsoever from evicting, restraining, or forbidding members of the petitioner from carrying their business as hawkers in the designated area until final determination of the petition.

2. The application which is brought under the Constitution of Kenya 2010 (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is predicated on the grounds that: The petitioner is a Society comprising about 6,000 members who are hawkers selling a variety of merchandise in the designated area as a means of earning a living for themselves and members of their families; That members of the petitioner and their families are approximately 20,000 souls whose livelihood depend on the hawking business of the petitioner's members; That since 2nd September 2016 when the respondents violently evicted members of the petitioner the petitioners' members have been forbidden by force from plying their trade; That this action has caused untold misery to members of the petitioner and their families; That the 1<sup>st</sup> respondent had promised to find an alternative trading area for the petitioners' members before they could be moved out of the designated area; That they were evicted before an alternative trading area had been found.

3. The notice of motion is further supported by a supporting affidavit sworn by Jeff Ouma Iteba the chairman of the petitioner sworn on 15<sup>th</sup> September 2016 annexing certificate of registration of the society, their constitution, correspondence with the City County of Nairobi and newspaper reports; and a further affidavit of the same deponent sworn on 19<sup>th</sup> September 2016 and filed in court on 20 September 2016 and filed in court on 20<sup>th</sup> September 2016 annexing copy of photograph for the site of the designated area from whence the petitioners were operating (hawking) their businesses from. before they were allegedly violently evicted on 2<sup>nd</sup> September 2016.

4. The notice of motion is anchored on the humble petition of the petitioner/ applicant herein filed on 15<sup>th</sup> September 2016 dated 15<sup>th</sup> September 2016 seeking for permanent injunction and temporary injunction, similar to the orders sought in the notice of motion subject of this ruling.

5. Only the respondent entered an appearance through their Advocate Mr Ogola. The 2nd and 3rd respondents did not appear.

6. The application was on 16<sup>th</sup> September 2016 certified as urgent by Honourable Onguto J who directed that I hear this matter on 21<sup>st</sup> September 2016. Regrettably, the 1<sup>st</sup> respondent's counsel was not ready for the hearing on the said date as he had just been served the previous day hence the court directed the application to be heard today interpartes. When this matter was called out today at 9.10 am, Mr Ilako advocate holding brief for Mr Ogola for the 1<sup>st</sup> respondent sought for an adjournment to enable them get documents from their instructing client as it had been difficult to do so. This court declined to grant any adjournment and directed the petitioner/ applicant advocates to proceed with their application.

7. Mr L.M.Ombete counsel for the petitioners/applicants submitted in support of his clients' application, while relying on the grounds, supporting affidavit, further affidavit and all the annexures thereto.

8. Mr L.M. Ombete emphasized on behalf of his clients that the actions of the 1<sup>st</sup> respondent which are in essence meant to implement the pressure asserted to it by the 3<sup>rd</sup> respondent was meant to deny the applicants their livelihoods and the right to inherent dignity. That as the County Government had committed itself to allocating the hawkers an alternative area to carry out their

businesses, it was mischievous of them to proceed to evict the petitioners' members from the designated site while negotiations were ongoing as exhibited by annexures JOO 5 a,b,c and d.

9. Further, that the action of evicting the applicants from designated area denied them the right to inherent decent living, housing, education and food for themselves and their children, which rights are guaranteed by Article 43 of the Constitution. That even the Governor himself had by the annexed newspaper report promised not to evict the applicants from the designated area until an alternative site was found hence the violent eviction was illegal.

10. In addition, it was submitted that since the petitioners herein are not parties to the Petition No. 14/2016 wherein the 3<sup>rd</sup> respondents had sued the 1<sup>st</sup> respondent asking for eviction of the petitioners, and as there is no eviction order from the court, it was illegal to evict the applicants hence the court should exercise its discretion and authority to restore the evicted hawkers to the designated area until the petition is heard and determined, in order to respect the dignity of the petitioners who have a right to do business and eke a living.

11. Mr Ilako holding brief for Mr Ogola had no response to the submissions by Mr L.M Ombete Advocate who appeared jointly with Mr Nyauchi for the petitioners/applicants.

12. I have anxiously considered the applicants'/ petitioners' Notice of Motion dated 15<sup>th</sup> September 2016 supported by a supporting affidavit, further affidavit, the annexures and the main petition which was filed contemporaneous with the application. I have also considered the submissions by counsel for the applicants and the fact that the application is largely not opposed.

13. The burden of proof lies on he who alleges. In this case, the burden of proving that their rights were being violated or threatened to be violated lies on the petitioners/applicants in their application which seeks for an order of injunction to issue restraining the respondents from evicting, restraining or forbidding members of the petitioner Association from carrying on their business as hawkers in the designated area until final determination of this petition as filed, which petition seeks for a permanent injunction.

14. The single most issue for determination in this motion heard *ex parte* is therefore whether the applicant/petitioner has proved on the evidence available, that they are entitled to the injunctive orders sought in the notice of motion.

15. In his submissions, Mr L.M. Ombete commenced by seeking for an interim mandatory injunction to compel the 1<sup>st</sup> respondent to allow the petitioners to return to the designated areas of business until the hearing and determination of their petition.

16. However, my meticulous perusal of the petition and the Notice of Motion does not reveal any prayer for a mandatory injunction being sought, seeking for restoration of the petitioner's members back into the designated area, now that it is trite, from the applicant/petitioner's application and petition, the members of the petitioner were violently evicted from the site on 2<sup>nd</sup> September 2016 with the assistance of the police.

17. A mandatory injunction which is a conservatory order in constitutional petitions must be specifically pleaded for the court to grant it. The court cannot speculate whether the injunction sought in the Notice of Motion and the petition is a mandatory or prohibitory injunction. It is clear in my mind that the applicants herein sought for a prohibitory injunction in their pleadings throughout and never attempted to amend their pleadings to include a mandatory injunction to enable this court consider it on its merits. This court must remind the parties that they are bound by their pleadings and that they cannot be found asking for bread in their petition and interlocutory application, but when they appear in court, they urge the court to grant them a snake or a stone. Trial by ambush is abhorred by the law that is why pleadings are filed and served upon the adverse party to notify them of the kind of case to expect and to respond to.

18. In this case, the applicants having been effectively evicted from the designated area where they lawfully carried out their businesses and paid taxes to the 1<sup>st</sup> respondent, the only remedy that this court would give them at this stage would be a mandatory injunction to restore them back into the designated area, assuming that they established a prima facie arguable case in this first instance.

19. Instead, whereas the applicants clearly sought for a prohibitive/restraining injunction in their pleadings, they changed tact in their submissions and asked for a mandatory injunction. Courts are liberal in granting leave to amend pleadings. In the case, the petitioners had the opportunity even to seek for oral leave to amend their pleadings. There was no such attempt. In my humble view, although the application was not defended, the orders of mandatory injunction as sought in the submissions are not simple orders which the court can on its own motion grant. They are substantive reliefs which a party must plead and invite the adverse party to respond to and even where there is no response, which cannot be interpreted to mean concession in disputes of this nature, the party applying for such a mandatory conservatory order in a constitutional petition must demonstrate to the satisfaction of the court that on the material presented, a court properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the opposite party.

20. The petitioners were ably represented by two senior advocates Mr L.M. Ombete and Mr Nyauchi. If they were acting *pro se*, this court would have had reason to doubt their legal prowess. But that is not the case here. In my view, it would be prejudicial to the respondents if this court was to consider the merits of the mandatory injunction sought through submissions when the respondents were only served with pleadings which sought for a temporary prohibitive injunction and which they may have ignored to respond to, after all, knowing that the court, which is deemed to know the law, cannot make such a serious error of law by granting a mandatory restorative injunction which the applicants never sought for in their petition and in this interlocutory proceeding.

21. In the end, I find that the prayer for a mandatory injunction is not grounded to warrant consideration and I accordingly reject it.

22. On the prayer for temporary injunction restraining and forbidding the eviction of the petitioners/applicant's members from carrying on their business as hawkers in the designated area until the final determination of this petition, this court notes that an injunction is designed to either stop/prohibit/restrain or compel some act or action on the part of the respondents.

23. In the instant case, what is sought to be restrained or prohibited or to be forbidden has already taken place. Where an eviction has already occurred, then there is nothing for this court to restrain, forbid or to preserve. In other words, interlocutory injunctions are granted prior to the trial, of an action or until further order is made in order to preserve the status quo until the court can hear the dispute fully. An injunction can issue to restrain an obstruction to justice. Where there is nothing to be preserved like in the instant case where the applicants/petitioners have already been evicted, the court is being asked to issue orders in vain. Court orders are never issued in vain.

24. Where it would be impossible to enforce a prohibitory injunction like in this case, it would be a waste of Judicial time and resources to venture into the territory of setting out principles applicable for grant of interlocutory injunctions even in constitutional or Judicial Review applications.

25. In **Gatirau Peter Munya Vs Dickson Mwenda Githinji & 2 Others SC Petition 2/2013** the Supreme Court set a threshold for the issuance of conservatory interim orders in a Constitutional Petition as follows:-

***“.....The test for the grant of conservatory orders under the constitutional applications must qualified to take into account the premium that the constitution places upon the enjoyment of fundamental rights. Such premium is to be seen in the easy access to the court that it granted to the applicants in terms of locus standi and the formality of documentation ( See Article 22 of the Constitution).*”**

*In such circumstances the balance of convenience test upon an arguable case being demonstrated by the applicant is more appropriate to preserve the enjoyment of rights pending hearing and determination of the petition for breach of fundamental human rights and freedoms.*

*Needless to state in terms of Article 24 of the Constitution, the balance of convenience must involve balancing the rights of the applicant against the rights of others whose enjoyment of those or other rights may be jeopardized or affected by the enjoyment by the applicant of the rights in question”*

26. In the instant application, and from the submissions of Mr L.M. Ombete, it clearly emerges that there are competing interests of the petitioners who seek to use the space for hawking business until an alternative area or location is found for them, and the interests of the 3<sup>rd</sup> respondents seeking vide Petition No. 14/2016 to compel the 1<sup>st</sup> respondent to implement rights relating to a clean and healthy environment.

27. It therefore follows that this court in considering whether a conservatory order can issue, and besides the test set out in the **Peter Gatirau** case by the Supreme Court, the court must have the proper prayers before it, capable of enforcement, while taking into account the provisions of Article 22(3) (d) of the Constitution which calls upon this court to observe the rules of natural justice. In other words, to determine that the applicants are entitled to a mandatory injunction when they specifically sought for an interlocutory injunction, even in the absence of any opposition to the application, would in my view be denying the respondents an opportunity to be heard on the oral prayer for mandatory injunction yet, from those oral submissions of the applicant’s counsel, there are competing interests of parties to this petition and application, which issues are being litigated in another matter before this court in a different file.

28. On the whole, I find that an arguable case for a prohibitory injunction has not been made out by the petitioners. Accordingly, I decline to grant the prayers sought in the Notice of Motion dated 15th September 2016. The same is dismissed.

29. Each party to bear their own costs.

Dated, signed and delivered in open court at Nairobi this 29th September 2016 at 2.30 pm.

**R.E. ABURILI**

**JUDGE**

In the presence of

Mr L.M Ombete and Mr Nyauchi for the Petitioners/applicants

N/A for the Respondents

CA: Adline