



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 362 OF 2016**

**NGONG MARKET SMALL TRADERS ENTERPRISES.....PETITIONERS**

**(acting in the interest of its members to the exclusion of those who may  
have sought relief in their own right)**

**VERSUS**

**KAJIADO COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

**The Petition**

[1] The petitioner, a group of small scale traders registered by Kajiado County Government under the Ministry of Education, Youth, Sports and Social Services vide certificate no. 497 registration NO. KJC/NCD/0161 dated 24<sup>th</sup> August 2015, who occupied 6x4 m *Kibandas* or selling tables at the Ngong Town Market bring this petition seeking protection of their Article 43 rights against the County Government of Kajiado, which in developing a Bus Park terminus at the Town is alleged to have demolished their *Kibandas* and evicted the petitioner's members without allocating them a suitable alternative site for their trade.

[2] The Particulars of the Petitioner's complaint is set out at Paragraphs 5 – 14 of the Petition as follows:

***5. The petitioners have been operating at the Ngong Bus Terminus for a period close to 20 years and having been paying revenues to the County Government but have now been unlawfully and unjustifiably evicted by the respondent to pave way for the construction of a Bus Terminus.***

***6. The respondent through the Member of the County Assembly, ("MCA") Ngong Ward visited the traders on 8<sup>th</sup> August 2016 and by oral notice demanded that petitioners vacate the present location in two weeks to pave way for the construction of a Bus terminus.***

***7. The Petitioners by a letter/memorandum dated 9<sup>th</sup> August 2016, expressed their dissatisfaction and concern in the manner which the County Government has conducted its affairs in relation to the project.***

**8. In true demonstration of the County Government disregard to social justice and its own objectives, the Petitioners were forcibly evicted on 26<sup>th</sup> August 2016 despite their calls for dialogue.**

**Particulars of infringement**

**The respondent has infringed Article 43 of the Constitution by;**

**a. Evicting the petitioners without proper notice;**

**b. Evicting the petitioners without offering an alternative location;**

**c. The respondent's actions amount to infringement of the petitioners' right to social security by disregarding their opportunity to earn a living through selling clothes, repairing shoes and sale of general merchandise as a means of protection of the right to be free from hunger; and**

**d. The respondent as the custodian of the county resources has failed in its duty to provide them with a place to carry out their businesses.**

**9. The proposed relocation site which has not been formally communicated is a parking area in front of other commercial buildings and this is not only unsustainable but is likely to breed new conflict between the commercial traders and the petitioners. This location is also not safe for the traders or their customers and public amenities like water and toilets have not been provided for.**

**10. The petitioners members operate in 6m x 4m "Kibandas" and are hardworking Kenyans trying to fend for their families in harsh economic times. To be treated as they have affirms that the respondent have no interest in the livelihood of Kenyans but are more interested in the project.**

**11. The respondent has failed to engage the stakeholders and residents of Kajiado in execution of its strategic initiatives thus failing the very people it is meant to serve and protect.**

**12. That despite raising concerns about the project and the need for consultative engagement, the respondent has ignored the petitioners and proceeded to ensure the traders were forcibly evicted from the said place of trade.**

**13. The respondents did not involve the petitioners in the evacuation plans and has in effect denied them their right to participate in their own affairs.**

**14. The respondent has failed in its mandate which is to adhere to public resource management and planning of markets and towns and this has not only caused financial ruin for the petitioners but has caused anguish and suffering.**

[3] On the basis of facts pleaded in the Petition, the petitioner seeks final orders as follows:

**a. A declaration that the forcible and brutal eviction of the petitioners members without according them proper notice and without issuing a designated alternative place to carry on the business and/ or accommodating is a violation of fundamental right to life guaranteed by Article 43 of the Constitution of Kenya.**

**b. An order for permanent injunction restraining the respondent, its officers agents or servants, employees and otherwise whosoever from evicting the petitioner's members from carrying out their business within Ngong Town within Kajiado County without provision of alternative designated places.**

*c. That this honorable court do make such consequential orders, issue such writs and directions as it deems appropriate to restrain the respondents from constructing or otherwise develop the Ngong Bus Terminus without provision of alternative designated places.*

*d. Costs of the petition.*

## **THE APPLICATION**

[4] By a Notice of Motion dated 29<sup>th</sup> August 2016, the petitioner seeks interim relief as follows:

*That this application be certified as urgent be heard ex-parte in the first instance.*

*An order for permanent injunction restraining the respondent, its officers, agents or servants, employees, and otherwise whosoever from evicting the petitioner's members from carrying on their businesses within Ngong Town within Kajiado County without provision of alternative designated places.*

*That this honourable court do make such consequential orders, issue such writs and directions as it deems appropriate to restrain the respondents its officers, agents or servants, employees from constructing or otherwise develop the Ngong Bus Terminus without provision of alternative designated places.*

*Costs of the application.*

[5] The Notice of Motion is supported by the Affidavit of Simon Maina sworn on 29<sup>th</sup> August 2016 which sets out in paragraphs 2-7 the factual basis of the application as follows:

*2. That, the MCA Ngong Ward, visited the petitioner at their place of business on 8<sup>th</sup> August 2016 and advised the traders in the market that they had two weeks to vacate, as the County Government was intending to construct Bus Terminus.*

*3. That, I was appalled by this turn of events as the notice was irregular and perplexed why the respondent had acted so casually and we sought to engage the respondent by a letter dated 9<sup>th</sup> August 2016.*

*4. That despite the respondent receiving the said letter on 15<sup>th</sup> August 2016, the respondent ignored the request for dialogue or any form of consultative talks, and proceeded to evict the plaintiffs members on 26<sup>th</sup> August 2016.*

*5. That Ngong Bus Terminus has been used by traders for many years and the County Government has been collecting daily payments from the traders and it is therefore unlawful and against social justice to evict the Plaintiff without proper notice and without a proper alternative location.*

*6. That the respondent has deliberately chosen to unilaterally make decisions that affect over 2000 traders and their families contrary to the spirit of public participation.*

*7. That should the construction of the Bus Terminus begin without the involvement of all stakeholders then the plaintiff was to suffer irreparable damage which cannot be compensated by damages.*

[6] When the matter came up before the Court for hearing ex parte on 30<sup>th</sup> August 2016, this Court declined to grant interim order sought noting that "as the petitioners have already been evicted as stated in paragraph 5 of the Petition and Paragraphs 4 of the Supporting Affidavit only a mandatory order is relevant which cannot be issued ex parte."

[7] Despite service of the Petition, the Notice of Motion and order of the Court on the respondent on the 2<sup>nd</sup> September 2016 as shown on the affidavit of service of Boniface Kyalo of 7<sup>th</sup> September 2016 and despite service of a hearing notice on 13<sup>th</sup> September 2016 for hearing on the 15<sup>th</sup> September 2016, the respondent did not file an appearance or attend court for the hearing of the application.

[8] The matter then proceeded for the hearing of the Notice of Motion on 15<sup>th</sup> September 2016, the absence of the respondent who had been duly served notwithstanding, when Counsel for the petitioner Mr. Charagu, urged the court to grant the orders sought relying on the Court's decision in *Mombasa HC Petition No. 3 of 2016 **Micro and Small Enterprises Association v. Mombasa County Government and Ors.*** [2014] eKLR.

### ***Factors to be considered for conservatory orders***

[9] In considering whether to grant the conservatory relief sought, the court must consider whether the petitioner has demonstrated an arguable case for the protection of constitutional rights; risk of prejudice or substantial loss if the conservatory order is not granted; and that the balance of convenience with regard to the public interest in the matter favours the granting the orders.

### ***Arguable Case***

[10] Article 43 of the Constitution provides that –

*“43. (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.*

*(2) A person shall not be denied emergency medical treatment.*

*(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”*

[11] In a similar matter in *Micro & Small Enterprises Association of Kenya Mombasa Branch (Acting in the interest of its Members to the exclusion of those who may have sought reliefs in their own right) v Mombasa County Government & 43 others* [2014] eKLR, this Court observed that -

*[I]t is the economic and social rights under Article 43 of the Constitution that would appear to entitle the petitioners to protection of their opportunity to earn their living through hawking business as a means of protection of the right to be free from hunger...”*

[12] Indeed, our Article 43 of the Constitution is based on the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**, 1966, which Kenya has ratified and is part of our law by virtue of Article 2 (6) of the Kenya Constitution 2010. Article 11 of the ICESCR **recognizes** the right of everyone to an **adequate standard of living** which includes the right to adequate food, clothing, housing, and the continuous improvement of living conditions.

[13] *The General Comment by the Committee on Economic, Social and Cultural Rights, General Comment 12 on the Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999) is helpful in understanding the state obligations with regard to the right to food:*

*“15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to **respect**, to **protect** and to **fulfil**. In turn, the obligation to **fulfil** incorporates both an obligation to **facilitate** and an obligation to **provide**. The obligation to **respect** existing access to adequate food requires **States parties not to take any measures that result in preventing such access**. The obligation to **protect** requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. **The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood**, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.”*

[14] Of course, the small scale traders and hawkers have a right to sell their wares and earn their daily bread, and the petitioners, therefore, have an arguable case that in demolishing their trade structures and evicting them from their places of trade, the county government is denying them an opportunity to earn their livelihood violating their constitutional right under Article 43 (1) (c) ‘to be free from hunger’. In this connection, the State would have failed in its protective and facilitative roles under the **ICESCR**.

[15] The County Government as a state organ is under a duty under Article 21 (2) of the Constitution in the following terms:

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

[16] There is also an arguable complaint that the petitioners were not consulted and the respondent has ignored their request for dialogue which would breach the right of people participation and fair administrative action under Articles 10 and 47 of the Constitution, respectively, as follows:

*“10. (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**.”*

*“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and **procedurally fair**.”*

## ***Risk of Prejudice***

[17] The substantial loss that is likely to result from the respondent's action is that being denied of their opportunity to earn a livelihood, the petitioners and their families' right to be free from hunger under Article 43(1) (c) will be violated.

[18] No doubt, their lack of financial resources, the consequences of loss of earning opportunity will result in the lowering of their standard of living below the Article 11 of the ICESCR standards of "an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

## ***Balance of Convenience with regard to public interest.***

[19] The Court has considered the pictures attached to the petition. It is clear that the construction of the Bus Park is at an advanced stage and it is obviously in the interests of the petitioners and the larger public of the Ngong Town that an expansive Bus Park be developed. There is obvious benefit to be gained for the general public, including the petitioners, by the development of a modern or improved bus park at Ngong Town. There will be more efficient handling of people and goods transport, among other benefits including aesthetic beauty of the Town. This calls for a balancing of the interests of the petitioners against those of the general public in the completion of the Bus Park.

[20] In the ***Micro and Small Enterprises Association*** case, supra, the Court found that the competing interests of the parties in the suit could be addressed in a way that protected the social economic rights of the petitioners, as follows:

*The court takes the view that all these interests are capable of being given simultaneous achievement by a judicious allocation of trading places for the petitioners in such areas and on such days and times conducive to the achievement and protection of the various interests identified above, and the county government as the custodian of the county resources is under a constitutional duty under Article 43 so to do.*

*In so doing, the 1<sup>st</sup> respondent will provide the petitioners with areas for operation by the hawkers of their respective businesses taking into account relevant matters including the following:*

*Planning and zoning as appropriate in the public interest.*

*The rights of others - stakeholder considerations with respect to the proximity of competing business from and accessibility to their shops, tourism and transport sectors.*

*The rights of marginalized groups under Article 21 (3) of the Constitution being 'the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, member of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.'*

*Security especially against terrorism, robbery and other criminal activity, and safety from fires and other natural catastrophe.*

*Special timings for access including weekends and public holidays to specified areas of the CBD*

*Availability of alternative allocation."*

[21] I would adopt the same model of interim relief in this case. I think that a similar formulae may be used to craft an arrangement where the petitioners in this case are provided with a suitable alternative site for plying their trade at a location to be determined by the respondent in consultation with the petitioner; and in addition or failing such a location, the petitioners to be allocated locations at the Bus Park on such days and times that the construction at the Bus Park is not ongoing or upon completion, on such days and

times that their trades do not obstruct the efficient flow of Bus Park operations.

[22] The Court does not, of course, prescribe the detailed workings of the arrangements that the parties may put in place to give effect to the rights of the petitioners. See Article 20 (5) of the Constitution. That is a matter for the respondent to determine in consultation with the petitioners pursuant to the principle of people participation, subject to reasonableness required of government action in implementing rights under Article 43 of the Constitution.

[23] As observed in the Order of the Court of 30<sup>th</sup> August 2016, the petitioners having already been evicted, a prohibitory injunction order as sought in Prayer No. 2 of Notice of motion is not relevant.

### **ORDERS**

[24] Accordingly, for the reasons given above, the Court grants the Notice of Motion dated 29<sup>th</sup> August 2016 as prayed in Prayer No. 3 upon terms that pending the hearing and determination of the Petition -

The Respondent shall in consultation with Petitioners within seven (7) days identify and allocate for the use by the petitioners a suitable alternative site within Ngong Town for the trade operations of the petitioners.

In the alternative, the Respondent and the Petitioners may agree on suitable areas, days and times where and when the petitioners may carry out their business at the area of the Ngong Town Bus Park Terminal before a permanent location is identified.

For avoidance of doubt, this order does not authorize any interference with the construction works for the new Bus Park at Ngong Town, which must go on as scheduled for the benefit of the residents and visitors of the Town.

Counsel for the parties to assist as appropriate and necessary to ensure compliance with the order of the Court.

[25] Liberty to apply.

[26] Costs in the cause.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances**

M/S Wandune Associates, Advocates for the Petitioner.

N/A for the Respondent.

Mr. Kazungu - Court Assistant.