



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 451 OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION AND VIOLATION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER
ARTICLE 19,20,31 AND 40 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 1,13,14,20(2),56 & 60 OF THE URBAN AREAS AND CITIES
ACT 2011**

AND

IN THE MATTER OF SECTION 134 OF THE COUNTY GOVERNMENT ACT 2012

BETWEEN

JAMES GACHERU KARIUKI

BEING A MEMBER OF AN IN THE INTEREST OF A GROUP

OF PERSONS T/A CONSITUYEN TRADERS.....APPLICANT

AND

THE COUNTY GOVERNMENT OF KIAMBU..... RESPONDENT

RULING

Introduction

1. By a Petition dated 9th September, 2014, the petitioner herein, **James Gacheru Kariuki**, seeks the following orders:
 - a. **A declaration that the said action(s) of the Respondent's its servant, Agents and/or Employees of Forceful Entry and the authorized search of the group's business premises on LR No. Kiambaa/Thimbigua/2061 and the seizure of a car washing**

machine there from were unjustified, unlawful and in violation of the constitution more so in breach of the individual constitutional rights of the members of the group as espoused under Articles 31(a)&(b) and 40 of the Constitution of the Republic of Kenya.

- b. A mandatory injunction compelling the Respondent to deliver up the car washing machine and/or immediate payment of the value of the machine of Kshs 300,000.
- c. An order for compensation of Kshs 500,000 to the individual members of the group by the Respondent for the unlawful and unconstitutional forceful entry into the group's business premises and the search therein and further the seizure of the car washing machine there from in violation of the rights of the individual members of the group under Article 31(a)&(b) and 40 of the Constitution of Kenya.
- d. an order for compensation of the individual members of the group by the Respondent in damages in the nature of Aggravated damages included in General damages of Kshs, 2,000,000 for trespass to goods.
- e. Any other or further order(s) and/or writ(s) or direction(s) the honourable court may deem fit to grant.

Petitioner's Case

2. The facts of the case as contained in the body of the petition and the supporting affidavit sworn by the Petitioner on 9th September, 2014 were that the Petitioner, a member of a group known as **Consituyen Traders** (hereinafter referred to "the Group") was the lawful, legal owners of a car wash business at a rented shed on LR No. Kiambaa/Thimbigua/2061 within the Kiambaa sub-county of Kiambu County in the Republic of Kenya.
3. However, he contended that on 31st July, 2014 the Respondent and/or its Agents and/or servants and/or employees without any colour of right forcefully entered into the said car wash business premises, searched the premises and confiscated and carted away a car wash machine Honda in make valued at Kshs 300,000. To the Petitioner, the said action was conducted in a malevolent and spiteful manner and the agents of the Respondent behaved in a high handed malicious and aggressive manner and which actions has caused and continued to cause the group irreparable loss and damages in the stoppage of the daily running of the business.
4. The Petitioner averred that the agents of the Respondent cited the contravention of the repealed Section of 9(1) of the General Nuisance By-Law 2010 of the Karuri Town Council disguising it as that of the sub county of Kiambaa as the basis of their actions.
5. The grounds upon which the petition was based were that the Respondent has never Debated and/or Enacted and by-law for its Kiambaa sub-county; that based on section 1, 13 14,20(2), 56 and 60 of the **Urban Areas And Cities Act 2011**, the Respondent having no city municipality or a declared town in it's territorial jurisdiction, all the by-law(s) made by the defunct local authorities under the **Local Government Act** Cap 265 Laws of Kenya within the now Kiambu County Government stand repealed and of no legal effect
6. The Petitioner further averred that in the absence of a National legislation limiting the group from enjoying their individual constitutional rights under Article 31 (a) & (b) and 40 of the Constitution of Kenya 2010, their individual rights under the said articles herein was violated and/or infringed, continues to be violated and/or infringed by the Respondent in the continued detention and conversion of the car washing machine.
7. To the Petitioner, the Respondent is a trespasser in relation to the confiscated care washing machine whose actions ought not to be justified on the grounds of sufficiency of an award of damages. However based on **AbdulhamidEbrahim Ahmed –vs – the Municipal Council of Mombasa Civil Suit No. 290 of 2000**, and **JLN and others versus the Director of Children Services and Others Petitioner No. 78 of 2014** the Petitioner contended that the members of the group were entitled to a claim of aggravated damages included in general damages of Kshs 2,000,000.00 and Kshs 500,000 each for violation of their privacy. In the petitioner's view the group is entitled to a total of Kshs 5000,000 each based on **James O. Onyango T/A Watch Dealers Wholesalers versus the Municipal Council Of Kisumu and Another Civil Appeal No. 54 of 1996**.

Respondent's Case

8. In response to the petition, the Respondent filed a replying affidavit sworn by **Fredrick Kitema**, its County Secretary on 22nd October, 2014.
9. According to him, the land known as **LR. No. Kiambaa/Thimbigua/2061** is located within Kiambaa sub-county in Kiambu County and that one **Richard Kabugu Gachogu** is the tenant residing thereon and operates a business thereon. Accordingly, the said businessman is required to pay various levies and charges to the County Government of Kiambu including a business permit to enable him trade at the area. However, the said **Richard Kabugu Gachogu** does not hold a valid business permit to operate the business within the county and thus traded illegally.
10. As a result of the said **Richard Kabugu Gachogu's** unlawful trade, the Respondent issued a notice to him requiring him to remove the structures from the land known as **LR. No. Kiambaa/Thimbigua/2061** and to stop operating illegal business within the county which notice was ignored leading to the enforcement of the said lawful enforcement notice.
11. According to the deponent, in so doing, the Respondent acted within the powers donated to it by the **County Government Act, 2012** and guided by the principles of planning and development facilitation as cited in Section 102 thereof as well as the County's strategies for revenue raising which require every person conducting business within the county to hold a valid business permit.
12. To him, the Petitioner herein **James Gacheru Kariuki** is unknown to the Respondent with regard to the issues raised in the Application herein and has no locus to institute this petition since the tenant **Richard Kabugu Gachogu** is not a member of the said Group.
13. He further contended that the annexed rent card and cash sale receipt were fraudulently obtained in the name of the Group with the intent to cause a misrepresentation to this Honourable Court and obtain orders fraudulently.

Petitioner's Rejoinder

14. In a rejoinder the Petitioner averred as follows:

- a. That **Richard Kabugi Gachogu** joined an already registered business/Consituyen/Trader/BN/2009 on 20th January, 2014.
- b. That upon **Richard Kabugi Gachogu** and others joining the already registered business aforesaid, the directors of the Group complied with the provisions of Section 9(1) of the **Registration Of Business Act** Cap 499 Laws of Kenya.
- c. That to run any business in Kiambu County, one does not require a business permit.
- d. That a business permits is not any property rates or entertainment Tax.
- e. That a business permits is not a fee that is authorized by any act of parliament currently in force in Kenya
- f. That a business permits is not a fee for any services rendered by the Respondent.
- g. That a business permit is an unconstitutional what is stated hereinabove.
- h. That further and in the alternative and without prejudice to the foregoing, a business permit is a fee that was contained in the null and void Kiambu County Finance Act 2013.
- i. That indeed business permit fees were the fees under the second schedule of the nullified Kiambu County Finance Act 2013.
- j. That indeed the car wash business on plot No. Kiambaa/Thimbigua/2061 is the property of the partners in constuyen traders BN/2009/39002.

k. That any director of the group of persons trading in the name and style of Consituyen traders has the entitlement under Article 22(2) of the Constitution of Kenya 2010 and the rules made by the Chief Justice, to institute the instant proceedings.

Determinations

15. I have considered the issues raised in this petition.

16. The first issue for determination is whether these proceedings meet the criteria for a Constitutional question in order to merit the same being brought as a Constitutional Petition rather than by way of an ordinary civil suit. **Nyamu, J** (as he then was) in **Muiruri vs. Credit Bank Ltd & Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** was of the view that:

“A constitutional issue in my view is that which directly arises from court’s interpretation of the Constitution.”

17. It follows that a wrong action or decision does not necessarily elevate the matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a Constitutional Petition. As was appreciated in **Pattni & Another vs. Republic [2001] KLR 264** in which **Harrikson vs. Attorney General of Trinidad and Tobago [1980] AC 265** was cited with approval:

“The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

18. In that decision it was appreciated that:

“No human right or fundamental freedom recognised in the Constitution is contravened by a judgement or order that is wrong and is liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. And where there are no higher courts to appeal to, then, no one can say that there was an error. The fundamental human right is not a legal system that is infallible but one that is fair and it is only errors of procedure that are capable of constituting infringement to the rights protection by section 1(a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction, . The error must amount to failure to observe one of the fundamental rules of natural justice.”

19. In my view, our current Constitution pervades all aspects of life so much so that any action taken by a party may easily be transformed into a constitutional issue by simply citing some provision of the Constitution however remote. Parties who intend to commence legal proceedings by way of a Constitutional Petition therefore ought to take note of the sentiments of the Court in **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193**, where the Court expressed itself as follows:

“We find that the making of an allegation of contravention of chapter 5 provisions *per se*, without particulars of the contravention and how that contravention was perpetrated would not justify the court’s intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings...Any such inclination to demand an inquiry every time there is a bare allegation

of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn triviliase the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry...”

20. I have on my part considered the issues raised in this petition and it is my view that though references have been made to certain provisions of the Constitution, the Petitioner's fulcrum of the cause is that the Respondent's action was illegal as it amounted to trespass without any legal justification. It was further contended that the said action was based on a piece of legislation which had been nullified by this Court. With respect to the first issue it is my view that that is an issue for ordinary civil litigation. With respect to the second issue that is an issue which can properly be dealt with in contempt proceedings rather than in fresh proceedings.
21. In my view to commence fresh proceedings every time decisions of the Court are not complied with would denude the courts with several unnecessary cases which ought to be dealt with in previous or existing legal proceedings. To that extent such proceedings may on occasion amount to abuse of the court process.
22. It is therefore my view that to the extent that these ordinary civil grievances were brought by way of a Constitutional Petition these proceedings are incompetent and without considering their merits I hereby strike out the Petition but with no order as to costs.

Dated at Nairobi this day 21st May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Petitioner in person

Cc Patricia