



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 4 OF 2015

ALI AHMED & 49 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF MANDERARESPONDENT

JUDGMENT

Introduction

1. The petitioners have brought this petition on 5th March 2015 alleging violation of Constitutional rights.
2. They claim to be residents and traders in Mandera Town and that on 3rd May 2014 the respondent, the County Government of Mandera issued a notice to the residents of Mandera town informing them that they would demolish the market in the town, and later indicated that there would soon demolish the said market and also evict livestock traders selling livestock in another market known as Bulgara Market.
3. The petitioners thus brought this petition seeking four reliefs as follows:-
 - a. **That the Honourable court issue a declaration that the petitioners fundamental rights and freedoms under Article 43 and 47 of the Constitution would be violated by the County Government of Mandera if they proceed with the demolition of the market and eviction of the traders.**
 - b. **That this Honourable court issue a permanent injunction against the respondent, its agents, officers or personal acting under their instruction from demolishing the Mandera Town market and the Bulagara market.**
 - c. **That the costs of this humble petition be provided for.**
 - d. **For such other order (s) and/or directions on this honourable court shall deem fit and just.**
4. The respondent filed a replying affidavit opposing the petitioners' request.
5. Before the petition was heard, on the consideration of an interlocutory application filed by the petitioners, the court issued a temporary injunction against demolishing the Mandera Town Market and the Bulagara market.

Petitioners Case

6. The petitioners, through counsel M/s. Wasuna & Company advocates filed their written submissions on 22nd June 2015.
7. It is the petitioners position that they have a locus standi to institute the petition under Article 258 of the Constitution of Kenya 2010 (the Constitution), as Kenyan citizens in their own interest or in

the interest of others whose Constitutional rights are violated or threatened with violation.

8. They maintain that 25 of the 50 petitioners herein exhibited receipts of fees paid to the respondent every month, and denied that the said receipts annexed were daily payment receipts.

The petitioners maintain that even if they were not traders in the market, they would still have locus standi to institute these proceedings under Article 258 (2) of the Constitution and rely on the case of ***Mumo Matemu –vs- Trusted Society of Human Rights Alliance & others (2013) eKLR*** in which the Court of Appeal held, inter alia that:-

“it still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the constitution in 2010 by the people themselves. In our view, the whether to stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today by dint of Article 22 and 258 of the Constitution, any person can instituted proceedings under the Bill of Right on behalf of another person who cannot act in their own name, or as a member of or in the interest of a group or class of persons or in the public interest”.

9. With regard to their own circumstance, the petitioners maintain that the temporary dashes referred to by the respondents in their response was what actually constituted the Mandera Town Market.

10. They also maintain that the assertion by the respondent that the unlicensed make shift structures and structures posed a security risk and had previously been used as hideouts for terrorists who carried out attacks in the town were false as the respondents had actually been collecting operating fees from the traders every month, and that was why the structures had not been demolished 40 years down the line. The petitioners state that the respondents thus owed them a duty to relocate them to another trading area if they were to demolish the market.

11. The petitioners also contend that the actions by the respondent had infringed Article 43 and 47 of the Constitution, which protected their human rights and fundamental freedoms as well as social and economic rights.

12. They claim that they and other residents of Mandera County, relied heavily on the Mandera Town and Bulagara market which were the backbone of the economy of Mandera Town and closure of the said markets would have devastating consequences on the livelihood of the residents contrary to the provisions of Article 43 (1) of the Constitution as it would deny the residents of income for their daily needs including medical and educational requirements.

13. Reliance was placed on the Trinidad and Tobago Case of *Whiteman Vs. Als of Trinidad and Tobago* [1991] iKLR (Const.) 536 and the case of ***June Seventeen Enterprises Ltd (suing on its own behalf and on behalf of and in the interests of 223 other persons being former inhabitants of KPA Masai Village Embakasi Nairobi Vs. Kenya Airports Authority & 4 Others (2014) eKLR,*** as well as the South African case for ***Grootboom and Others Vs. The Government of the Republic of South Africa and Others (2001) (1) SA 46.***

14. The petitioners emphasize that it is the States responsibility to protect every Kenyan from unlawful and unwarranted evictions and that the state should instead provide, and protect the poor, weak, marginalized and vulnerable by taking positive steps to prevent evictions of the type complained of in this case. They rely on Article 47 of the Constitution on fair administrative action.

15. The petitioners further maintain that the respondent will violate their rights to fair administrative action if the demolition is carried out and rely on South African case of ***President of the Republic of South Africa & Others Vs. South African Rugby Football Union and Others (CCT 16/98) 2000 (1) SA 1,*** as well as the case of ***Philip Jalango Vs. Mwangi Muthee & Another***

(2014) eKLR the letter of which the court adopted what was stated by the Court of Appeal in the case of Pashito Holdings & Another Vs. Ndungu & 2 others CA No. 138/1997 (UR) as follows:-

“The rule of audi alteram partem, which means “hear the other side”, is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him.”

16. Reliance was also placed on the case of Multiple Hauliers EA Ltd Vs. The Attorney General and 11 Others – Petition No. 88 of 2010 in which due process was emphasized by the court where a public authority intended to deprive individuals of their fundamental rights and freedoms.
17. The petitioners case is also that the respondent did not have exclusive discretionary power to plan and develop the Mandera County. They claim that the land on which markets stood was public land under section 62 (1) of the constitution and its management should involve the National Land Commission and the public. They relied on the case of Serah Mweru Mulu Vs. Commissioner of Lands 12 others (2014) eKLR – in which the High Court stated that the National Lands Commission was the institution that had the mandate to manage public land, which included land that was controlled by the County Government.
18. The petitioners also maintain that under section 6 (6) of the County Governments Act, peoples participation was required in the performance of the functions a County Government and stated that they were not consulted or invited to participate in the decision to demolish the two markets.
19. The petitioners therefore state that they are entitled to the orders sought in the petition.

The Respondents Case.

20. The respondent’s case is that the Constitution and the County Government Act No. 17 of 2012 and the Physical Planning Act, conferred on them certain mandates and responsibilities including the setting up and running of markets. That it was in that spirit that they advertised and issued tenders for improving the existing market infrastructure and develop new markets.
21. They state that in the process, they noted the existence of makeshift structures erected in Mandera Town, which posed security risks and environment hazards. They thus issued and sent notices to residents to remove the makeshift structures with a final notice dated 3rd May 2014. They maintain that the Constitution and the law confers powers on the County Government to do so.
22. With regard to locus standi, the respondent contends that the petitioners lack locus standi to institute the proceedings herein as they had no proprietary interest in the property referred to – as they referred to makeshift structure and not the market in their Notice of Motion, while the petition referred to markets in Mandera town.
23. In any case, the respondents argues, the petitioners did not tender evidence in court to demonstrate that they had proprietary interests over the said makeshift structures and as such they could not claim to have locus standi to bring these proceedings on accounts of the said makeshift structures.
24. The respondent maintains that they acted in accordance with the Constitutional mandate when they advertised and issued tenders for development of the markets. They relied on Chapter 11 of the Constitution and paragraph 7 and 8 Part 2 of the Fourth Schedule of the Constitution as well as the provisions of the County Government Act No. 17 of 2012 – which gave them the mandate to develop and regulate trade and markets. They maintain that they held consultative forums with stake holders before issuing the notices and that as such the notices issued on 3rd May 2014 and the tender advertisements in the local dailies on 25th December 2014 were legal and legitimate.
25. The respondents denied that they violated Article 43 and 47 of the Constitution. They claim that the petitioners had not demonstrated with precision the right they allege to have been violated, the manner of violation and the relief they seek. The respondents rely on the case of Trusted Society of Human Rights Alliance Vs. Attorney General & others – Petition No. 229 of 2012.
26. The respondents agree that the petitioners were licencees allowed by the County Government of Mandera to conduct business on the Mandera market but state that they cannot claim any exclusive right to the said property. According to the respondents, the hawkers licencees were mere daily receipts to allow hawkers to carry on business on daily basis and could not confer proprietary interest on the petitioners, even if they were so licenced.

27. They relied on the case of *Veronica Njeri Waweru & 4 others Vs. City Council of Nairobi & 2 others (2012) e KLR* and the case of *John Kamau Kenneth Mpapale Vs. City Council of Nairobi & 7 others [2014] eKLR* and maintained that in the case of *Veronica* (above) the court held that the fact, that the petitioners were licensed for a duration of 10 years to operate on a road reserve, did not confer a right which could be violated under Article 40 of the Constitution.
28. Lastly, the respondent argued that the petitioners did not establish a case for the grant of either a permanent injunction or a declaration. They relied on the case of *Giella Vs. Cassman Brown & Company Ltd [1973] EA 358*. They argued that the petitioners had not shown a prima facie case with probability of success. They have not demonstrated that they would suffer irreparable loss if the orders sought are not granted. The balance of convenience was also in favour of the respondents and the public, as the action of the respondent was intended to achieve improved trade and economic affairs in the County.
29. They urged that the petition be dismissed with costs.

Analysis and Considerations.

30. From the documents filed and submissions on both sides, certain facts are not in dispute. The petitioners are residents of Mandera County. Some, if not all have been licensed by the respondent to operate market business in the Mandera Town area or market. The respondent is the County Government of Mandera established under the Constitution and the County Government Act with a mandate to establish, operate, and manage markets in the County. The respondent had issued notices for removal of some trading structures in the Mandera Town market and had advertised tenders for the upgrading of markets in the Mandera County.
31. In my view, the issues for determination are as follows:-
1. Whether the petitioners have locus standi to bring these proceedings.
 2. Whether their Constitutional Rights or those they sue for have been or are threatened with violation.
 3. Whether the petitioners are entitled to the prayers sought.
32. The first issue is whether the petitioners have locus standi to bring this petition. This is a Constitutional petition, though Notice of Motion was filed as an interlocutory application pending determination of the petition, and orders given.
33. Locus standi in Constitutional matters is governed by the provisions of Article 258 of the Constitution, which provides as follows:-

158(1) Every person has a right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with contravention.

- 2. In addition to the person acting in their own interest, court proceeding under clause (1) may be instituted by***
 - a. a person acting on behalf of another person who cannot act in their own name***
 - b. a person acting as a member of, or in the interest of, a group or class of persons,***
 - c. a person acting in the public interest; or***
 - d. an association acting for one or more of its members,***

34. The petitioners have come to this court as traders or some of the traders, in the Mandera Town market which is slated for demolition or upgrading. The respondent admits that some of the petitioners have been paying licence fees to them but that the licences were daily licences. The respondent claims that the petitioner must demonstrate a proprietary interest to have locus standi. The petitioners claim that the licences were for monthly runs and for over 40 years now.

35. In my view, the petitioners have locus standi to come to this court under Article 258 (1) and (2) (b) of the Constitution. They do not have to prove ownership of markets, as they are licensed as

operators, not as owners of the structures. In my view the licence is a sufficient interest to give rise to locus standi in this Constitution Petition. It must be appreciated that locus standi is not the same thing as the merits of the case. It is a mere basis or justification that gives a litigant a platform to file and pursue a case in court.

The observation by the court of Appeal in the case of *Mumo Matemu –vs- Trusted Society of Human Rights Alliance and Others (2013)* Eklr clearly demonstrates the legal and constitutional position when the court stated as follows:-

“it still remains to reiterate that landscape of locus standi has been fundamentally transformed by the enactment of the constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today by dint of Article 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights on behalf of another person who cannot act in their own name, or as a member of or in the interests of a group or a class of persons or in the public interest.

36. Locus Standi therefore stands for sufficient interest, not the

merits of the case. Both as licencees at a fee, as well as on behalf of other residents of the County, the petitioners in my view have locus standi to bring this Constitutional petition.

37. The second issue is whether the Constitutional rights of the petitioners or those they have sued for have been or are threatened to be violated.

38. The petitioners claim to have come to court also for the wider interests of residents of Mandera County. The Constitution lists various Constitutional rights such as a right to life, liberty, freedom of association, right to own property and many others. The violation or threatened violation of any of these rights is a Constitutional issue. Other violations of the law however are not issues for the Constitutional court, but ordinary civil claims to be pursued in the normal manner through the civil process. As such courts have held that a petitioner who comes to the Constitutional court has a duty to demonstrate with some degree of precision the right (s) he alleges have been or are threatened with violation, the manner of the violation and reliefs he seeks for the said violation – see ***Trusted Society of Human Rights Alliance Vs. Attorney General and Others – (2013) eKLR.***

39. In the present case the petitioners claim that they are monthly licencees of the respondent at the Mandera Town Market for over 40 years. They have been paying fees for the licences to operate their businesses. They also claim that they were not consulted when a decision was taken by the respondent for the demolition of their makeshift trading structures and the upgrading of the Mandera Town and the Bulagara Markets as required by the Constitution.

40. With regard to the Bulagara Market, other than the allegation by the petitioners that the market is a livestock market, they do not allege that any of them conducts trade in that market. They did not describe how that market operates and who operates there. Clearly in my view, there is no demonstration by the petitioners of any Constitutional rights conferred on the petitioners or any member of the public which has been or is threatened with violation at the Bulagara market. This court cannot give orders in a vacuum. As such the petition with regard to the Bulagara market has to fail as the petitioners have not demonstrated any right which has been or is threatened with violation. Mere demolition or upgrading of that market is not a violation of a Constitutional right.

41. With regard to the Mandera Town Market, the petitioners say they operate makeshift shades and that they have been licenced by the respondents for more than 40 years on a monthly basis. The respondents say that the petitioners, or at least some of them, were hawkers who were licenced on a daily basis. The petitioners also claim that they were not consulted when the decision to demolish their structures was reached by the respondent.

42. Indeed, in the case of ***June Seventeenth Enterprises Ltd (suing on its own behalf & on behalf of and in the interest of 223 other persons being former inhabitants of KPA Maasai Village Embakasi within Nairobi) Vs. Kenya Airports Authority & 4 others (2014) eKLR*** the court held

that the constitution imposes on the State a positive duty to ensure access by its citizens to economic rights. It is however, important for a petitioner to demonstrate the right or rights that are to be protected from violation. A right to trade in a market has to be consonant with legal ownership of the space to trade, as well as the legality or Constitutionality of the activities in the market.

43. In the case of *Veronica Njeri Waweru & Others Vs. City Council of Nairobi & 2 others 2012 eKLR* the court held that where petitioners had been licenced to operate on a road reserve for over 10 years, and had no proprietary interest in the land, their rights could not be violated under Article 40 of the Constitution because of the fact that no proprietary interest was established.
44. In the present case, the petitioners have demonstrated that they own temporary structures at the Mandera town market and claim to have operated or traded there for over 40 years. They claim that their licences were issued by the respondents monthly. My perusal of the receipts filed reveals that some payments were for auction of single animals like camels, some were for dash fees, others were for auctions. What this means is that the petitioners right to operate lasts for the period or activity indicated in the receipt. They have not challenged the period or purpose of the licence, nor have they asked for its extension. They have merely complained about the decision requiring them to remove the makeshift structures due to proposed upgrading of the market and for security reasons. The action by the respondent, as far as I can see it does not amount to a constitutional violation of the petitioners social or economic rights. In my view, the petitioners have not demonstrated a violation of their Constitutional rights at the Mandera Town Market.
45. The next issue is whether the petitioners are entitled to the reliefs sought. The petitioners have asked for a declaration that their fundamental rights and freedoms under Article 43 and 47 of the Constitution will be violated if the respondent proceeds with the demolition of the markets and eviction of the traders. They have also asked for a permanent injunction against the respondent from demolishing the Mandera Town and Bulagara markets.
46. Having perused the Provisions of Article 43 and 47 of the Constitution, I find no violation of the petitioners Constitutional rights if the respondents demolish the markets. I will thus not issue the declaration sought. With regard to a permanent injunction, that order is also not grantable. The respondents have a Constitutional and legal obligation to establish, improve and run markets, which are not necessarily limited to the two markets herein. Therefore they cannot be visited with a blanket permanent injunction not to demolish any of the existing markets for any reason whatsoever. It does not make practical, constitutional, legal or economic or social sense to grant such an injunction. In addition, the petitioners have not satisfied the general requirements for the grant of injunctive orders as enunciated in the case of *Giella –vs- Cassman Brown Ltd (1973)EA 358*. Though the petitioners counsel has raised the issue of the petitioners being relocated to the new or upgraded markets, that is not a prayer in the petition and the court cannot grant the same.
47. The petitioners also ask for costs. As this is a public interest matter though the petitioners are not successful, I will order that parties bear their respective costs of the proceedings.

Conclusions

48. To conclude, this court determines this petition as follows:-

- i. As the petitioners have not demonstrated a violation or threatened violation of any Constitutional rights, and have also not demonstrated entitlement to any of the reliefs sought, the petition herein is dismissed.
- ii. Any interim or interlocutory orders granted by the court are hereby vacated.
- iii. I order that each party will bear their respective costs of the proceedings as this is a public interest matter.

Dated and delivered at Garissa this 23rd day of July 2015.

GEORGE DULU

JUDGE