



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION PETITION NO. 3 OF 2014

IN THE MATTER OF: ARTICLE 2 3, 6, 10, 19, 21, 22, 23, 25, 26, 27, 28, 29, 35, 35, 37, 47, 48, 50, 165, 186 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26 (1), (3), 27 (1), (2), 28, 29 (c) (d) 17 OF THE CONSTITUTION AND RULE 11 (c) AND 12 THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULE, 2013 AND ALL OTHER RELEVANT ENABLING POWER & PROVISIONS OF THE LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

MICRO AND 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) PETITIONERS

AND

MOMBASA COUNTY GOVERNMENT 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

RULING

Introduction

0. By a petition dated 28th January 2014, through its officials Chairman Abdikadir Billow Osman, Secretary Simon Kinuthia Kiarie and Treasurer Sofia Edith Nyadundo, Micro and Small Enterprise Association of Kenya (the petitioners) on behalf and in the interests of its members have sued the County Government of Mombasa, the Inspector General of Police and the Attorney General protesting removal from their previous allocated business areas in the Mombasa Island of the 1st respondent's County and alleging breaches in relation to them of several constitutional and fundamental rights and freedoms, and sought reliefs principally as follows:
 - a. ***A declaration that the forcible violent and brutal eviction of the petitioners members without according to them designated place to carry on the business and/or accommodating within the trade arrangement of the county government is a violation of fundamental right to life guaranteed by article 2, 3, 6, 10, 21 (1), 22,23, 25, 26, 27 35, 36, 37, 47, 48, 50, and 186 of the Constitution of Kenya.***
 - b. ***An Order for permanent injunction restraining the Respondents, their officers, agents or servants, employees, and otherwise whosoever from evicting the petitioner's members from carrying out their business within Mombasa County without provision of alternative designated places.***
 - c. ***That this honourable court do make such consequential orders, issue such writs and directions as it deems appropriate to restrain the respondents from interfering with the peaceful carrying of business by the petitioner's members within the Central Business (District) of Mombasa County, more particular, the county commander of police do carry out the duties under the Police Act and for purposes of enforcing or securing the enforcement of any of the provision of the constitution of Kenya. (sic)***
0. Simply put, the petitioners grievance is that on the night of 19th January 2014, despite previous agreement with the Municipal Council of Mombasa as to peaceful operation of their businesses and ongoing negotiations with the current county government by way of a proposal dated 20th November 2013 presented by the petitioner on the county government's request and without notice and opportunity to be heard, the county government's askaris and the Kenya Police demolished their hawking tables within various places in the city and on the following day the 20th January 2014 evicted all the Petitioners who had operated for more than 5 years as a duly registered association and welfare group.
0. The petitioners complain that in purported exercise of powers under Article 186 of the Constitution and Fourth Schedule there-under [which sets out the functions and powers of the national and county governments where trade development and regulation are under county government] without notice to the petitioners and without giving them an alternative place of business, removed the petitioners or stopped them from operating their businesses at designated points previously agreed upon by the then county administration, the Municipal Council of Mombasa and the District Commissioner, the 1st respondent has acted unconstitutionally. Paragraphs 5 and 6 of the Petition sets out this complaint as follows:
 - “5. *In pretended exercise of the powers conferred by Fourth Schedule Part 2 (7a, b & c) Article 186 of the Constitution of Kenya the 1st respondent [has] without giving proper notice to the petitioners, removed the petitioners and /or stopped them from operating [their] business at designated points as agreed in a meeting with the then National Government District Commissioner now County Commissioner.*
 6. *That despite requests and demand for information by petitioner to regularize the co-existence between the hawker and the County Government as per earlier government that (Municipal Council of Mombasa agreement dated 27th February, 2012) the 1st respondent has failed/refused and/or ignored to avail information demanded which in essence was intended to shed light as to proper details necessary for the petitioner to enforce its rights under the Constitution.”*
0. Simultaneously with the Petition, the petitioners filed an interlocutory application by Notice of

Motion dated 28th January 2014 seek interim relief pending the hearing and determination of the application *inter partes*, which was declined at the *ex parte* stage, and further pending hearing and determination of the Petition. At the *inter partes* stage, therefore, the reliefs sought were Prayers Nos. 3, 4, and 5 as follows:

3. **THAT** the respondents herein jointly and severally be and are hereby restrained and/or stopped by themselves, agents, servants, assigns, representations, unions, supervisors from interfering and/or removing, evicting the Applicants from carrying out their business in the manner and the places they were carrying their business before their eviction pending hearing and determination of the Petition.
4. **THAT** the County Police Commander and do ensure compliance with the order and ensure that peace and security prevails.
5. **THAT** the Honourable Court be pleased to make such further or other orders or relief as it may deem just and expedient in the circumstances of this case.

5. The Notice of Motion was supported by the affidavit of the Petitioner's Chairman sworn on the 28th January 2014 and a further affidavit supporting affidavit of 10th February 2014 which demonstrated that the petitioners had been operating at various designated areas with the agreement with the Municipal Council of Mombasa and that some of their members had been paying hawking levy until March 2013 when they were allegedly informed by the mayor that the fees had been waived until further notice. It was averred that after the new county government came into office, the petitioners held meetings with the Governor and officials of the County government when it was agreed that the petitioners present a proposal of the designated areas where the petitioners may use to operate from for consideration, but that before the proposal was considered they were without notice evicted from their hawking areas on the 10th January 2014.

6. The 1st respondent filed a replying affidavit through its Ag. County Secretary, HAMISI MASHOBO MWAGUYA, which, while conceding that the petitioners had been operating at various designated places in the City and that there was a pending proposal for the consideration by the 1st respondent regarding the petitioners hawking areas, opposed the petitioners application on the following main grounds:

xxi. *That I aver to be aware that the Mombasa Island with its limited space and narrow streets taking into account the massive shop owners business operations, motor traffic, bicycles, handcarts and the multitude of people visiting or working is an inappropriate area from which to carry out hawking as it disrupts or obstructs movement by pedestrians, fire brigades and ambulances making it unsafe and environmentally unfriendly to buildings, shop owners, shoppers, tourists, school children, the sick, the old members of society and the general public along the street within the Island.*

xxii. *That taking into account the competing public interest and the private interest of the less than 1,700 hawkers in the matter it is reasonable, prudent, just and practicable for the greater interest of the Kenyan Nation with a population of over 50 million that the Mombasa Island should be kept safe and environmentally friendly to attract more tourists noting that tourism is a major foreign income earner for the Nation.*

xxiii. *That I aver that hawking is not a permanent job but a business activity when done lawfully payment is either daily or weekly as may be lawfully specified from designated places and in absence of payment and Petitioners declining to operating from designated areas of Mombasa west, Likoni and Mombasa North the present proceedings are premature and unsustainable.*

xxiv. *That clearly from the pleading/exhibits the Association has not exhibited any permit or license duly paid for as required by law to allow any hawking business operations within the Mombasa Island to justify the grant of the orders sought in the motion.*

7. The 3rd respondent filed a replying affidavit through the Deputy OCPD Mombasa County, Mr. Tom Okoth, who averred that the police had no role in relation to the allegations made by the petitioners and 'only acted in providing security to lives and property as it usually turns violent

during such operations’; that although he had not been consulted in the negotiations between the petitioners and the 1st respondent; and that *‘the presence of hawkers within the CBD is a great security threat as most of the structures erected along roads and pavements provides dens for thugs’*.

8. The Interested parties filed a replying affidavit by one OMAR SHARIFF AHMED the substance of which asserted their right to equal protection of the law as licenced shop owners to earn their living as follows:
 4. **THAT** the Interested Parties are duly licensed to operate their business along various street of Mombasa.
 5. **THAT** the Interested Parties are persons carrying out various business to earn their living and they are tax payers.
 6. **THAT** the Petitioners have invaded the streets long which the Interested Parties carry out their business thereby blocking the entrances of various businesses situated along the streets.
 7. **THAT** the Petitioners in an arbitrary move and without due regard to the interest of the Interested Parties invaded the streets and blocked the entrances of their businesses thereby denying the Interested Parties their right to carry out their businesses peacefully.
 8. The Interested Parties are Citizens and are thus entitled to protection of their fundamental rights and freedoms as guaranteed under the Constitution of Kenya, 2010
 9. **THAT** the move and action by the Petitioners to invade the streets and block entrances of the various shop owners is illegal, unconstitutional and unlawful.
 10. **THAT** the Petitioners have invaded the parking lots that have been reserved for the owners of the shops.
 11. **THAT** the existence of the Petitioners along the streets is a threat to the safety and security of not only the shop owners but for the wider public.
 12. **THAT** the Petitioner existence on the streets is an obstruction to safety and security of the shop owners and of the wider public especially in emergency cases such as fire, explosion and/or other crisis situations as they are blocking the entries and exits routes available.
 13. **THAT** the Petitioners have infringed the shop owner rights to peacefully carry out their business so that they can earn their living.
9. After unsuccessful attempt by the parties at amicable settlement on the recommendation of the Court, hearing of the Notice of Motion took place on the 13th February, 2014 when counsel for the parties – Mr. Shimaka for the Petitioners, Mr. Mogaka for the 1st respondent, Mr. Ngari for the 2nd and 3rd respondents and Mr. Abed for the Interested Parties, with leave of court – made oral submissions and ruling was reserved for the 18th February, 2014.
10. Upon considering the pleadings, affidavits and submissions by the parties, it would appear that the question before the court is whether the petitioners have demonstrated a case for the grant of conservatory orders sought. At this stage, the court does not have to make a finding on disputed facts as set out in the respective affidavits for the parties, although there is not much dispute on the salient facts. The objection by counsel for the 2nd and 3rd respondents that an injunction cannot be granted against the officers of the government in terms of section 16 of the Government Proceedings Act is not well taken in view of the express provisions of Article 23 of the Constitution which provides the injunction as one of the remedies for breach of fundamental rights and the provisions of Article 20 of the Constitution which provide that the Bill of Rights binds the State and all its organs.
11. The Petitioners presented their case as infringement of their right to life on an argument based on the metaphysical causation of death by want of food that would be occasioned by the denial of their business opportunity. It would appear, however, that their grievance translates to an infringement of the social economic right of social security under Article 43 of the Constitution. The petitioners have also cited the Article 25 of the Universal Declaration of Human Rights (UNDHR), 1948 which provides in part as follows:

“(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and

necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

12. Although it is not cited by the petitioners as one of the fundamental rights violated, it 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 and to social security. As authorised by the decision of ***Githunguri v. AG*** (1985) KLR 1, this court, in the interests of justice, shall deem the petitioner’s application as brought also under the provisions of Article 43 of the Constitution.
13. Although payment of levy and licence has a statutory basis, the petitioners’ Article 43 rights does not flow from the payment of licence neither does the licence or levy crystallize the right. The liability to pay the levy is imposed for the regulation of the exercise of the right as way of raising revenue, which is justifiable in an open and democratic society in terms of Article 24 of the Constitution and failure to pay may attract a penalty or arrears but does not take away the right to earn a living. The applicants are entitled to earn their living though subject to payment of levy, and the 1st respondent may be entitled upon hearing to recover past levies but this should not affect the present and future enjoyment of the petitioners’ rights. Indeed, the Constitution imposes a duty on the State to provide social security “to persons who are unable to support themselves and their dependants.” See Article 43.
14. The petitioners also raised the issue of fair administrative action under Article 47 of the Constitution in that they were not consulted or given notice of impending demolition of their hawking tables and neither were they given an alternative place to set up their hawking business. I think that on both issues of breach of social security rights and fair administrative action, the petitioners have an arguable case to warrant the court to grant conservatory orders as prayed. See Mombasa Constitutional Petition No. 6 of 2011, ***Kenya Transport Association v. The Municipal Council of Mombasa and Anor*** and ***Multiple Hauliers East Africa Limited v. Attorney General and 10 Ors.*** (2013) eKLR.
15. With respect, although the counsel for respondents submitted on the basis of the standard of prima facie case with regard to temporary injunctions in civil cases as established by the decision of ***Giella v. Casman Brown*** (1973) EA 583, the test for the grant of conservatory orders under constitutional applications must be 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 is granted to applicants in terms of ***locus standi*** and the formality of documentation. See Articles 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 right 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 jeopardised or affected by the enjoyment by the applicant of the rights in question.
16. In my view, the Court has a primary duty under Articles 20, 21, 22 and 23 of the Constitution to protect an applicant from possible harm from violation, or threatened or likely violation, of his rights without waiting to remedy the harm after the threatened danger has occurred; the court must make orders to pre-empt such injury and to preserve the enjoyment by the applicant of his right until the court hears and determines, through the Petition, the question whether there has been violation or threatened violation of the right. For instance, in the circumstances of this case, the applicants should not suffer violation of their social economic rights for want of an earning capacity before the hearing of their Petition. If a reasonable complaint of violation or threatened violation of rights is made, the court ought to ensure that the situation is conserved to permit no violation or further violation and to put paid to any threat of violation pending the hearing of the petition.
17. The court has taken into account that at the time of the demolition of their hawking tables and subsequent eviction, the petitioners were in the middle of negotiations with the new county government and operating their businesses on the basis of agreement with its predecessor, the Municipal Council of Mombasa. I have also considered that the respondents removed the

- petitioners without allocating them an alternative place to carry out their businesses. Although the petitioners initially sought an injunction to restrain their removal from the places where they operated from prior to the eviction on 20th January 2014, their counsel in submissions prayed only for allocation of places outside the CBD as a conservatory measure pending hearing and determination of the petition.
18. The concerns of stakeholders who are affected by the petitioners carrying out business in the areas are bona fide and must be considered. The County Government should have considered these concerns and it must consider these concerns in its addressing the proposal presented at its request by the petitioners. However, before the proposal is addressed and a determination made with due notice to the petitioners, the respondents would not be entitled to arbitrarily evict the petitioners. It was, moreover, the duty of the 1st respondent to consult the stakeholders before making a decision on the petitioners' proposal.
19. The public interest in security from terrorism, safety in case of fires and general convenience of vulnerable groups, and the development of tourism as a single important revenue earner for the County and the country at large cannot be over-emphasised. For these public interests, the free flow of people and traffic along the roads and streets is important and the presence of hawkers may understandably clog the road system. The interest of private stakeholders such as the shop-owners whose shops are blocked by the hawkers who operate on verandahs and pavements right outside their shops are also to be considered. However, the interests of the petitioners in earning a living as a social economic right is also important and the 1st respondent is under a duty to provide a place for them to carry out their businesses. It is a matter of balance of these respective interests.
20. 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.
21. In so doing, the 1st respondent will provide the petitioners with areas for operation by the hawkers of their respective businesses taking into account relevant matters including the following:
- a. Planning and zoning as appropriate in the public interest.
 - b. The rights of others - stakeholder considerations with respect to the proximity of competing business from and accessibility to their shops, tourism and transport sectors.
 - c. 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.'
 - d. Security especially against terrorism, robbery and other criminal activity, and safety from fires and other natural catastrophe.
 - e. Special timings for access including weekends and public holidays to specified areas of the CBD
 - f. Availability of alternative allocation.
22. Accordingly, pending the hearing of the petitioners' petition herein, as conservatory measure, the court orders the respondents to permit the conduct by the petitioners of their hawking business in areas outside the Central Business District (CBD), Mombasa as previously agreed with the county government's predecessor, the Municipal Council of Mombasa, subject to payment daily or weekly in advance individually or through the petitioners' association of appropriate levy at the last agreed daily rate, at designated places on days and times to be allocated by the 1st respondent county government taking into account the interests of the stakeholders, the security, cleanliness, decongestion of the streets and related concerns and on condition that no structures are erected on the streets, pavements and shop entrances.
23. The Parties, with the assistance counsel, will hold meetings for the immediate implementation of the allocation to the petitioners of business locations and to report to court on compliance and for further orders as to the hearing of the petition within 14 days from today.

Dated signed and delivered on the 18th February 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Shimaka for the Petitioners

Mr. Abed for Mr. Mugaka for 1st Respondent

Mr. Eredi for 2nd & 3rd Respondents

Mr. Abed for the Interested Parties

Linda - Court Assistant