



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 89 of 2012

JAMES MBUGUA GICHURU & SAMUEL KIMANI

SUING ON BEHALF OF NYAMAKIMA CEREAL TRADERS

WELFARE GROUP PETITIONER

AND

CITY COUNCIL OF NAIROBI..... RESPONDENT

JUDGMENT

1. This is a claim by the Nyamakima Cereal Traders Welfare Group, an association of traders, who own shops and who deal in cereal foods along Duruma Road in downtown Nairobi in the area popularly known as Nyamakima Area. It is duly registered under the Ministry of Gender, Children, and Social Development as a self help group.
2. Their petition is borne out of what they consider sense of frustration with the services they receive from the Nairobi City Council (“the Council”) because they claim that the Council has abdicated its role in providing an orderly and conducive trading environment in the area by failing to enforce the provisions of **Section 163(a)** of the *Local Government Act (Chapter 265 of the Laws of Kenya)* through appropriate by-laws.
3. Amongst the complaints raised by the petitioners is the fact that hawkers and other cereal traders without premises and licenses have overrun the area thereby denying them business; that lorries and prime movers continue to block the roads making it impossible for customers to access their premises; that the Council has permitted unlicensed hawkers to sell their wares along Duruma road without complying with health and safety by laws thereby endangering the public.
4. The petitioners aver that these complaints were the subject of memoranda forwarded to the Council. They complain that the memoranda including letters sent by their advocates remain unanswered. Mr Macharia, counsel for the petitioners, urged the court to enforce the Council obligation to the petitioners and the public to ensure public health, safety and a secure business environment.
5. In the circumstances, the petitioners aver that their rights under **Article 46** and **47** have been infringed and that they seek the following reliefs.

(a) *A declaration that the petitioners’ rights and freedoms under Article 46 and 47 of the Constitution of Kenya have been violated.*

- (b) *A declaration that the petitioners are entitled to compensation or the infringement of the aforesaid rights.*
- (c) *An inquiry be conducted on the amount of compensation payable as a result of violation of the petitioners' rights.*
- (d) *An order of mandamus directed to the Respondent requiring it to do the following;*
 - (i) *To direct its officers collect cess at the point of entry and not outside the petitioners' premises.*
 - (ii) *To strictly prohibit or control peddling, hawking and street trading outside the petitioners' premises pursuant to section 163(a) of the Local Government Act.*
 - (iii) *To ensure that city Askaris and policemen assigned duties in Nyamakima area carry with them sufficient identification to avoid cases of mistaken identity.*
- (e) *An order of prohibition directed to the respondent requiring it to stop issuing more licenses for public service vehicles booking offices in Nyamakima area.*
- (f) *Costs of the suit.*

6. The petition is opposed by the Nairobi City Council grounded on the affidavit of Aduma Owuor sworn on 14th November 2011. He denies that the situation in Nyamakima is “*utterly chaotic and disorderly*” as alleged by petitioners. The respondent also avers that the first time he has seen the complaints raised by the petitioners regarding the issues of Nyamakima was when the petition was served upon the Council. In the circumstances, Mr Omwebu, counsel for the Council, contended that there could not have been a breach of Council’s responsibilities.

7. I have considered the petition, depositions and submissions and I take the following view of the matter. The Constitution is based on sovereignty of the people who have delegated it to the State. Various State agencies are required in accordance with the Constitution and the law to give effect to the wishes of the people. This process requires constant engagement and dialogue between the these institutions and the people which is why **Article 10** articulates specific values of national governance such as democracy and public participation. Public authorities are required to constantly engage with citizens and this engagement is underpinned by other rights such as right of access to information guaranteed under **Article 35** and the right of fair administrative action under **Article 47**.

8. I am alive to the fact that there is a statutory duty imposed on the Council to regulate the manner of carrying out business, trading and other activities in accordance with by-laws enacted pursuant to the **Local Government Act**. The Court is not expected to supervise the minutiae of the Council’s daily administration nor should it interfere with the carrying out of its statutory functions absent a violation of the Constitution or the law. It is for this reason that it is not possible to issue prayers (d) and (e) of the petition.

9. However, in the new dispensation, a local authority must be sensitive to public outcry or sentiments. As I observed in ***Kituo Cha Sheria v Independent Electoral and Boundaries Commission and Another Nairobi Petition No. 574 of 2012 (Unreported)***, “[37]In an era where the Constitution obliges public institutions to be accountable and transparent, it is important that public institutions respond to queries raised by civic minded citizens. I would hasten to add that the right of access to information guaranteed under **Article 35** underpins the values in **Article 10(c)** of “**good governance, integrity, transparency and accountability.**””

10. It is the duty of the Court to enforce these values and principles and in my view this matter is to be resolved by directing that the Council constructively engage with the petitioners. The Council is therefore directed to deal with the grievances raised in the memorandum addressed to the Town Clerk

annexed to the founding affidavits as soon as reasonably practicable.

11. My decision then will give effect to these principles and values and shall be as follows;

(a) The City Council of Nairobi is directed to constructively engage with the petitioners and therefore consider and deal with the petitioners grievances contained in memoranda addressed to it and in particular as summarized in the petitioner's advocates letter dated 26th November 2010 in light of its obligations under Article 47 of the Constitution.

(b) There shall be no order as to costs

DATED and DELIVERED at NAIROBI this 24th day of January 2013

D.S. MAJANJA

JUDGE

Mr T. Macharia instructed by Mbugwa, Atudo and Macharia Advocates for the petitioner.

Mr Omwebu instructed by Prof. Tom Ojienda and Associates for the Respondent.