



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 88 OF 2012

BONIFACE MUIGAI WANJENGA AND 318 OTHERS1ST
PETITIONERS

VERSUS

THE CITY COUNCIL OF NAIROBI1ST
RESPONDENT

RICHARD GITAHU2ND
RESPONDENT

PENINAH OCHIENG3RD
RESPONDENT

SIMON KIGUATHI4TH
RESPONDENT

MARTIN MWANIKI5TH
RESPONDENT

JOSEPH WANDERE6TH
RESPONDENT

JUDITH ONYANGO7TH
RESPONDENT

JOHN PAUL WACHIRA8TH
RESPONDENT

JUDGMENT

Introduction

1. In their petition dated 21st March 2012, the petitioners, who are traders in the Gikomba open air market, allege a violation by the respondents of their rights under Articles 28, 29, 40 and 46 of the Constitution.
2. The petitioners first came before the court on 21st March 2012 when they sought orders to stop the 1st to 8th respondents from demanding payment from them for use of the open air market. The 1st petitioner is the City Council of Nairobi (hereafter '**the City Council**' or '**1st respondent**' interchangeably) while the 2nd – 8th respondents (the respondents) are individuals operating as an association known as Muungano Jua Kali Association. I granted temporary orders stopping the collection of payment from the petitioners pending inter partes hearing of the application on 28th March 2012.
3. On 28th March, 2012, I gave directions with regard to filing of responses and hearing of the application and extended the interim orders to the 2nd of May 2012 when the application was scheduled for hearing.
4. However, on 12th April 2012, the respondents appeared before Ochieng J ex parte for hearing of an application dated the same date in which they contended that the interim orders granted on 28th March 2012 touched on a property belonging to Muungano Jua Kali Association, to which they belong; that the petitioners were using the interim orders to sub-divide the suit property; and that the subject matter of the petition may be alienated before the hearing date scheduled for the 2nd of May 2012.
5. The court granted orders in which it restrained both the applicants and the respondents from collecting rents from the persons who are tenants in the subject property and directed that any rents payable before 2nd May 2012 be received by the Advocates for the two parties jointly, until further orders. Following a consent order on 13th June 2013, a joint account was to be opened at Kenya Commercial Bank, Salama House Branch.
6. The petition was argued before me on 10th June 2013.

The Petition

7. In the petition dated 21st March 2012, the petitioners seek the following orders:
 - a. ***This Court makes a finding that the 1st respondent is under obligation and duty of disclosing who the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents are and their interest on the subject property.***
 - b. ***The 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents and any other person of like character are trespassers and be stopped by this Honourable Court from demanding any payment from the petitioners and disturbing the Petitioners on the Open air market of their trade area.***
 - c. ***This court makes a finding that the fundamental rights of the petitioners as envisaged in Articles 19,20,21,22,23,40 and 46 of the Constitution of Kenya 2010 have been breached by:-***
 - i. ***Subjecting the Petitioners to double jeopardy by having to pay twice to different persons for the utility of the Open Air Market Gikomba.***
 - ii. ***Failure by the 1st Respondent to disclose who the 2nd, 3rd, 4th, 5th 7th and 8 respondents are and their interest on the subject property.***
 - iii. ***Refusal by the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents to disclose their specific interest on***

the open air market at Gikomba.

- iv. *Extortion exercised upon the Petitioners by the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents without intervention by the 1st respondent even when it is clear money is paid to them no receipts are issued.*
- d. *An order of permanent injunction restraining the 2nd, 3rd, 4th, 6th, 7th and 8th Respondents by themselves, their servants, agents and/or assignees from encroaching upon the Open air Market at Gikomba demanding any kind of payment of any amount from the Petitioners, claiming ownership of the open air market area or purporting to assert or claim any right over the open air market area in use by the petitioners.*
- e. *Any other relief.*
- f. *Costs of this Petition.*

The Petitioners' Case

8. The case for the petitioners as presented by Mr. Njue is that they have a Temporary Occupation Licence (TOL) issued by the City Council for which they have been paying rent; that they have, however, been compelled to make double payment as the respondents have been demanding payment from each of them of kshs 2,500 per month, and that the actions of the respondents amount to a violation of their rights under Articles 28, 29, 40 and 46 of the Constitution.
9. Mr. Njue relied on the petition dated 21st March 2012, the affidavit in support sworn on the same date by Mr. Boniface Mungai Wanjenga, a supplementary affidavit sworn by Mr. Wanjenga on 3rd April 2012, as well as written submissions dated 30th November 2012.
10. In the affidavit in support of the petition, **Mr. Wanjenga** depones that the petitioners have been allocated an open air market at Gikomba by the City Council for which they pay cess every day. They aver that they also pay, over and above the cess to the City Council, an amount of Kshs 2,500 demanded by the respondents for which no receipts are provided.
11. They aver that they have asked the respondents to declare their interest in the Gikomba open air market by producing documents to show their ownership but they have refused to do so and continue to extort the said amount from them; that failing payment, the respondents interfere with the petitioners' businesses in the market. They aver that the City Council has failed or refused to address the issue. They have therefore come to seek orders from the court as they believe that they are entitled to protection under the Constitution.
12. In his Further Supplementary Affidavit sworn on 14th May 2012, Mr. Wanjenga avers that the City Council issued them with a renewal of their licence to continue to occupy the open air market at Gorofani Gikomba. He annexes to the said affidavit a copy of the TOL dated 16th April 2012, a plan of the area as well as copies of receipts in respect of payments made to the City Council.
13. The petitioners claim that they are aggrieved by the respondents as the City Council has been collecting cess on a daily basis from them amounting to Kshs160,000,00 every month for one year; that the respondents have been extorting money from them at the rate of Ksh 2,500 per person per month but have not been issuing receipts for the payments; that the respondents are not licensees of the City Council nor are they owners of the land; and that they have been using hired 'goons' to collect money from the petitioners.
14. According to Mr. Njue, the petitioners were relying on Article 46 of the Constitution with regard to consumer rights. He asserted that the City Council is a public entity and the petitioners are

entitled to good services; and that the respondents are infringing on the petitioners' economic interests as the petitioners are being subjected to double jeopardy as they have been made to pay twice for the same land.

15. Mr. Njue contended further that the respondents have infringed on the rights of the petitioners to acquire property through trading; and that their rights under Articles 28 and 29 of the Constitution have been infringed as they are subjected to torture when the respondents demand payment from them.

16. The petitioners claim that the City Council has, in the replying affidavit sworn by J.N. Kariuki on 2nd July 2012, recognised them by stating that the respondents are strangers to it, and there is therefore no legal basis for the respondents to collect any rents from the petitioners. They submit that the land in question is public land; and pray that the respondents should be declared trespassers and stopped from demanding payment from them.

The Response

The 1st Respondent's Case

17. Ms. Mogusu presented the case for the City Council and relied on the replying affidavit sworn by one J.N. Kariuki, the Director, Social Services & Housing Department, on 2nd July 2012 and submissions dated 21st May 2013.

18. The position taken by the City Council is that an injunction cannot issue against it as it is a local authority and there are other remedies available to address issues such as the ones raised in this petition.

19. On the factual issues, the City Council admits knowledge of the petitioners' operations from the open air market as they have paid the required fees to it. It argues, however, that they have never complained to it about paying levies to the respondents and so it is a stranger to the allegations in the petition. Mr. Kariuki depones that the open air market at Gikomba is under City Council management and the respondents have no authority to block those who are sanctioned to use it.

20. According to the 1st respondent, it normally gives a TOL for businesses under its jurisdiction to anyone who makes an application and pays the requisite fee, and a daily hawker's receipt is proof that daily hawking fees have been paid. It asserts that the petitioners have no case against it as their main allegation is that the respondents have been extorting money which they term rent, but they have not stated that it is the City Council which is in control of the respondents or that they are its agents.

21. The City Council concedes that the property in question is its property; that a TOL had been issued to the respondents but was later cancelled; that neither the petitioners nor the respondents have attached daily hawkers' receipts as evidence of entitlement to the Gikomba space, and it asserts therefore that the petitioners have no claim against it.

22. Ms. Mogusu submitted that the petitioners have no legal interest to be protected by the court as it had not been shown what constitutional rights have been violated; that the TOL relied on by the petitioners was issued in April 2012, after this petition, which was filed in March 2012, was already in court; and it asks that the petition be struck out as against it.

The 2nd -8th Respondents' Case

23. Mr. Njeru for the respondents relied on the replying affidavit and further affidavit sworn by the 4th respondent, Mr. Simon Kiguathi, on 27th March and 21st May 2012 respectively. The respondents elected not to file any written submissions or authorities on the matter.

24. In the affidavit sworn by Mr. **Simon Kiguathi** on 27th March 2012, the respondents aver that they are all members of an association known as **Muungano Jua Kali Association**, and that the petition touches on their property, T.O.L. Lamu Road. They allege that they have been in occupation of the property since 1997 when it was allocated to them by the City Council. They have relied on annexure **“MJK1,”** a temporary occupation licence issued by the 1st respondent and dated 19th November 1997.
25. Mr. Kiguathi depones that they are the rightful and/or legal owners of the premises where some of the petitioners display their wares upon paying cess to the City Council; that the association was allocated the property in 1998 by the City Council and some of the petitioners are their tenants and they therefore have the right to demand rent due and owing to them.
26. The respondents claim that the property is not an open air market but an enclosed area which their association developed; that it cannot accommodate 318 people as alleged by the petitioners; that some of the members of the association also display their wares on the subject property and pay cess as well as rates to the City Council.
27. In the further replying affidavit sworn by Mr. Kiguathi on 25th May 2012, the respondents claim that the petitioners have, in their affidavit of 14th May 2012, produced fabricated evidence; that the renewal of the licence to the petitioners evidenced by annexure **“BMWT”** had been cancelled by the City Council upon the respondents’ complaint. I note that there is a letter from the City Council dated 24th May 2012 addressed to Mr. Boniface Muigai Wanjenga & 320 Others cancelling their temporary occupation licence for Gikomba Gorofani Open Air Market upon a complaint. It does not indicate from whom.
28. The respondents contend that there is no case established against them by the petitioners. They allege that the documents relied on by the petitioners pertain to Gorofani open air market while the petition refers to the Gikomba open air market; that the petitioners have admitted that they have been paying rent of Ksh 2,500 that although the petitioners have alleged that they have a superior right against the respondents, they have not demonstrated how their constitutional rights have been violated.
29. The respondents further claim that they have enclosed the area in question and have paid water and electricity bills for it, and they contend that the petitioners are out to deprive them of a place they rightfully own. They concede, however, that the property is public land to which they have a TOL.

Determination

30. The petitioners allege violation of their rights under Articles 28, 29, 40 and 46 of the Constitution by the City Council and the respondents. The issue that falls for determination therefore is whether there has been a violation of any of the petitioners’ rights under the said Articles.

Violation of Articles 28 and 29

31. Article 28 contains the constitutional guarantee to human dignity, while Article 29 protects personal liberty and security of the person. From the facts before me, I am unable to find a violation of these two provisions by the respondents. The petitioners have not adduced any evidence to show how their right to dignity guaranteed under Article 28 has been violated. Similarly, with regard to the right to personal liberty and security of the person, there is again no evidence before me to support the allegation that the right has been violated. A reference to torture was made by Counsel for the petitioners on the basis that they are subjected to torture by the respondents’ demand for rent, but this falls far from the definition of torture recognised in law as contained in Article 3 of the **Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment (ICAT):**

‘ For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

Violation of Article 46

32. Similarly, it has not been demonstrated how the provisions of Article 46 of the Constitution have been violated. Article 46 provides that:

(1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

33. In my view, this Article, which applies to the quality of goods and services offered by private and public entities to consumers, can have no application to the present case. The petitioners are aggrieved, not by the nature or quality of goods or services provided by the City Council, but by what they see as its failure to control the manner of dealing with its property to protect them from exploitation and extortion by the 2nd-8th respondents. There is therefore, in my view, no violation of the rights protected by Article 46.

Violation of Article 40

34. The petitioners have alleged violation of Article 40 of the Constitution. In this regard, in my view, they are on even shakier grounds than on the other two Articles. In so far as the land on which they trade is concerned, they have readily deponed that it belongs to the City Council, and that they are paying cess to it in order to carry out their businesses. Article 40 protects an owner of property from being deprived of that property without compensation. It provides as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

35. As the petitioners are not the owners of the subject property, they do not have a basis for alleging violation of their rights under Article 40.

Are the Petitioners Entitled to Any Relief?

36. Ordinarily, my findings that the petitioners have not demonstrated a violation of their rights under the provisions of the Constitution that they have relied on would put an end to this matter.

However, this Court is enjoined by the Constitution to do justice, and to grant appropriate relief in a matter brought under Article 22. Were I to take a formalistic stance and conclude that as the petitioners have not demonstrated violation of their rights under Articles 28, 29, 40 and 46 they are not entitled to any relief, I would, I believe, fail to live up to the dictates of the Constitution. This is because of the patent unfairness that the petitioners are placed in by the respondents in this matter.

37. The petitioners state that they have been paying cess to the City Council, and at the same time, they have been compelled to pay a further Kshs 2,500 shillings per month to the respondents allegedly as rent. Yet, while the petitioners have no claim of ownership to the land, neither do the respondents, the City Council having expressly disavowed any authority given to the respondents to lease the land to third parties and collect rent from them. The City Council has also expressly deponed that the 2nd -8th respondents had temporary occupation licences, which expired.
38. In such circumstances, is it lawful for the 2nd - 8th respondents to collect any form of payment from the petitioners? The land at issue is public land, which belongs to the City Council (now the County Government of Nairobi). The City Council was collecting cess from the petitioners to allow them trade on its land. At the same time, it appears to have allowed other parties, who, on its own admission, have no greater right to the land in question than the petitioners, to charge them rent to carry out business on the same land.
39. It seems to me that in a situation where the owner of the property has expressly stated that the 2nd-8th respondents have no authority to collect rent from anyone in respect of the land, there can be no basis for them to assume such right on the basis of a TOL issued more than 16 years ago.
40. In the circumstances, while the petitioners have not established a violation of the constitutional rights they alleged violation of, on the basis of the evidence before me from the petitioners and the respondents, it is clear that the respondents have no legal basis for demanding rent from the petitioners.
41. The 1st respondent has a duty, as a public entity in which is vested public land, to ensure that none of the people within its jurisdiction is unfairly exploited. To allow the 2nd - 8th respondents, who, from the TOL issued to them in 1997, were paying a monthly cess of Kshs 1,000, to demand a monthly payment of Kshs 2500 from each of the petitioners for the right to trade on land that belongs to neither of them is to permit exploitation of the petitioners. This would be to adversely affect their right to a livelihood implicit in the rights guaranteed under the Constitution, particularly at Article 43.
42. The City Council and its successor, the County Government of Nairobi, has a duty to manage its properties in such a way that it gives equal opportunity to all parties within its jurisdiction to fairly trade and carry out business. In this regard, it must balance the conflicting interests of the petitioners and the 2nd-8th respondents by ensuring access to them all to space on which they can carry out their trades.
43. Consequently, my orders are as follows:
- i. ***The 2nd-8th respondents, their servants or agents are hereby restrained from demanding or collecting any rent or other payment from the petitioners in respect of Gikomba Gorofani open air market.***
 - ii. ***The 1st respondent is hereby directed to ensure that only such payments as are lawfully due to it from traders in the said market are levied by its officers and official receipts duly issued.***
 - iii. ***The funds deposited in Account No. 11354070737 Kenya Commercial Bank Salama House Mortgage Centre Branch in the joint names of the Counsel for the petitioners and Counsel for the 2nd- 8th respondents shall be refunded to the petitioners forthwith and at any rate within 14***

days of the date hereof.

44. Each party shall bear its own costs in respect of this petition.

Dated, Delivered and Signed at Nairobi this 30th day of August 2013.

MUMBI NGUGI

JUDGE

Mr. Njue instructed by the firm of Mwathi Njue & Co. Advocates for the Petitioners

Ms. Mogusu instructed by the firm of Momanyi & Associates Advocates for the 1st Respondent

Mr. Gichovi instructed by the firm of Njeru Gichovi & Co. Advocates for the 2nd - 8th respondents