



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 397 OF 2013**

**BETWEEN**

**NATIONAL CITIZENS FORUM**

**INITIATIVE .....1<sup>ST</sup> PETITIONER**

**NAIROBI COUNTY CITIZEN'S FORUM INITIATIVE.....2<sup>ND</sup>  
PETITIONER**

**JOSEPH GITONGA KIHANYA .....3<sup>RD</sup> PETITIONER**

**NICHOLAS OYOO OCHIENG .....4<sup>TH</sup> PETITIONER**

**AND**

**THE GOVERNOR OF THE COUNTY OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF THE NAIROBI COUNTY INSPECTORATE .....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE**

**.....4<sup>TH</sup> RESPONDENT**

**A CITY COUNCIL SECURITY OFFICER.....5<sup>TH</sup>  
RESPONDENT**

**JUDGMENT**

**Petitioners' Case**

1. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners are unincorporated bodies of persons who together with the 3<sup>rd</sup> and 4<sup>th</sup> petitioners have moved the court by a petition dated 1<sup>st</sup> April 2013. They state that they are the promoters of an “*amendment by popular initiative*” under **Article 257** of the Constitution. They petitioners appeared in this matter *pro se*.
2. The petition and depositions are not the model of pleading but I have nevertheless tried to set out what I consider the core of their case against the respondents in so far as it was articulated by them during the proceedings.
3. The grievance is that their right to collect signatures and agitate for support for the proposed constitutional amendment through use of public space within the City of Nairobi is hampered by the County Government represented by the Governor acting through the Director of the County Inspectorate. The petitioners aver that the city *askaris* have been harassing them by arresting or threatening to arrest them thus preventing them from using public space for conducting civic education.
4. They also complain that some of the people involved in conducting civic education have been arrested and charged before the City Magistrate’s Court. They have annexed to the deposition Joseph Gitonga sworn on 20<sup>th</sup> August 2013, a letter dated 22<sup>nd</sup> April 2013 addressed to the Governor of Nairobi County complaining about of harassment by a city council askari, one Mr. Kangele. They also complain that some of their members have been charged with various offences including ,“*Advertising contrary to section 30(i) with reference to section 3 of Physical Planning Act Cap 286 and punishable under section 30(2) of the same Act*” and ‘*obstructing a free passage of a street contrary to by law 14(a) of the City of Nairobi(General Nuisance) By-Laws, 2007.*”
5. The petitioners aver that they have been denied the freedom of expression, political rights, right to property and fair administrative action as guaranteed by **Articles 37, 38, 40 and 47** of the Constitution. The petitioners contend that the people have a right to participate in the affairs of their governance as enshrined in several Articles of the Constitution; **Articles 1, 10, 118, 174, 184, 196 and 232** and that it was the responsibility of the National and County governments to facilitate the public as they engage State organs in their policy formulation and legislative processes.
6. When this matter came up for directions, I directed the parties to meet and agree on an accommodation to facilitate the collection of signatures. It appears that there has been no agreement leaving this court to make a determination hence the matter was heard on the merits.
7. In the petition filed on 2<sup>nd</sup> August 2013, the petitioners asked the court for the following reliefs:

*[2] That this Honourable Court sitting as a Constitutional Court do declare that the process of signature collection as per Article 57 of the Constitution should not be interfered with by the City Council or other state organs.*

*[3] That this Honourable court sitting as a Constitutional court do declare that the constitutional activities of the civil society are not anchored on any institution other than the civil society itself.*

*[4] That this Honourable court sitting as a constitutional court declares that all public venues and spaces (unless otherwise booked for public events) are to be availed to the citizens for the purposes of public discourse and participation in issues of governance*

*[5] That this Honourable court directs the government to desist from interfering, harassing and intimidating members of the civil society carrying out their constitutional mandates*

*[7] Or such order(s) as this Honourable Court shall deem just.*

## Respondents' Case

8. The respondents have opposed the petition on the ground that the conduct and actions of the petitioners, if allowed, will block the free passage of pedestrians and is in breach of the County By-Laws. They assert that the activities intended to be carried out are prohibited by the by-laws and to permit these activities would amount to allowing blatant violation of the law. The respondents also contend that the County has designated special places where public meetings can be held if proper arrangements are made.
9. According to the deposition of Abwao Eric Odhiambo, the County Assistant Director of Legal Affairs, sworn on 26<sup>th</sup> August 2013, various building owners have complained about interference with their business, blockage of right of access and obstruction of roads due to unscheduled and disorganised meetings on the Nairobi Streets conducted by the petitioners.
10. The respondents contended that the petitioners' rights are not absolute and are subject of the rights of other Nairobi residents to enjoy a conducive environment of doing their business and that they are bound to conduct their business within the by-laws.

## Determination

11. The petitioners' case is that they have been denied the opportunity to agitate their political cause within the City of Nairobi. When I requested the petitioners to clearly state their expectations for consideration by the County, the petitioners in a memorandum, responded as follows;

*We, the petitioners of the matter mentioned above, state the following expectations of the Nairobi County Government;*

1. *That the County Government avails the Nairobi County Hall for a County Citizen Forum at least once a month and a permanent adjoining office for ensuring the ensuing processes.*
2. *That the following areas be allocated for continuous public debate and collection of signatures;*
  - i. *The Tom Mboya Monument Grounds*
  - ii. *The areas around 7<sup>th</sup> August Memorial Park*
  - iii. *Mama Ngina/Wabera Street junction pavements*
  - iv. *Kencom stage grounds*
  - v. *Aga Khan Walkway*
  - vi. *Freedom Corner in Uhuru Park*
  - vii. *On the junction in front of Afya House between Ngong Road and Cathedral Road.*
  - viii. *Along the fire station wall opposite Old Nation House.*
  - ix. *Agip Stage on Haile Selassie Avenue*
  - x. *Outside City market*
  - xi. *Along Harry Thuku road*
3. *That all social halls be designated (at least twice a month) for purposes of public assemblies for the local communities. This is along with other public facilities e.g., schools and other institutions with meeting facilities and public gatherings.*
4. *That notwithstanding the above areas, the County Government should make available an inventory of all the public facilities in their trust for use by local communities.*

12. The duty of the High Court under the provisions of **Article 22** and **23** is to determine whether there has been a violation of the petitioners' fundamental rights and freedoms and if there has been grant appropriate relief.

13. In this case the petitioners are asserting the rights that underpin the exercise of the sovereignty of the people underlined in the preamble to the Constitution and **Article 1**. These rights include that right to assemble protected by **Article 37**, that is the right to "*peaceably and unarmed, to*

*assemble, to demonstrate, to picket, and to present petitions to public authorities.”*

14. These rights are not absolute and are subject to reasonable regulation that is consistent with the provisions of **Article 24** of the Constitution which provides that a right and fundamental freedoms may be limited by law and only to the extent that such limitation is reasonable and justifiable in an open and democratic society. Thus, in the circumstances of this case, it would be reasonable for the County Government, to provide for the regulations of traffic, meetings along thoroughfares and open public spaces apart from those public places specifically designated for open and public meetings.
15. On the whole the petitioners have not demonstrated a violation of specific fundamental rights and freedoms. Joseph Gitonga, in his position refers to a letter dated 3<sup>rd</sup> June 2013 where, as Co-ordinator of the National Citizen Forum, he wrote to the Inspector General of Police notifying him of the intention to hold a demonstration to protest the increment in the pay of Members of Parliament. The Inspector General of the Police, in a letter dated 7<sup>th</sup> June 2013 advised the parties to notify the Provincial Police Officer so that security could be arranged. This is hardly evidence of a denial of the rights to assemble within the City.
16. It is true that the petitioners have a right to assemble but this right must be exercised in such a manner as not to interfere with other citizens' rights. In the circumstances, the County Council cannot be condemned for enforcing the by-laws and ensuring that the petitioners' activities do not violate other residents' rights.
17. I have not heard the petitioners to say that the County government has acted outside its mandate or that the manner in which it is enforcing the law is outside its powers or is unreasonable or amounts to an abuse of power. I am therefore unable to find fault in the action of the County authorities of arresting the petitioners in enforcement of the County laws.
18. The petitioners have also raised the issue of public participation. Public participation is one of the national values and principles articulated in **Article 10** of the Constitution and which underpins the sovereignty of the people. How this participation is to be achieved is to be left to each State organ to determine. Public institutions have a broad measure of discretion in how they achieve the object of public participation. How it is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Sachs J., observed in ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*** 2006 (2) SA 311 (CC) at para. 630, that, *“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”* (see ***Law Society of Kenya v Attorney General Nairobi*** **Petition No. 318 of 2012 (Unreported)**, ***Consumer Federation of Kenya (COFEK) v Public Service Commission Nairobi*** **Petition No. 263 of 2013 [2013]eKLR** and ***Moses Munyendo & 908 Others v Attorney General and Another Nairobi*** **Petition No. 16 of 2013 [2013]eKLR**).
19. At the end of the day how public participation in the affairs is achieved is within the discretion of the County authority and no case has been made for this court to issue the directives sought in the absence of a specific violation. The petitioners have not demonstrated that the notion of public participation is lacking or absent in the conduct of the affairs of the County.
20. That is however not all. One of the statutory duties of the County government is to facilitate the establishment of structures to enable citizen participation in accordance to **section 91** of the ***County Governments Act (No. 17 of 2012)*** including town hall meetings and citizen fora. I believe the County authorities should consider the suggestions made by the petitioners and engage with them to open up opportunities for enhanced public participation.

21. Finally, as regards the petitioner's plea to be granted venues to collect signatures for their proposed referendum drive, the petitioners have not demonstrated that they have been denied the opportunity to collect signatures or engage with the public in places designated for that purpose within the City or that the conditions imposed are unreasonable to the extent that the right is negated. What the petitioners seek is for the court to descend into the minutiae of governance to order the County to allocate them specific spaces for their activities. That is the function of the County government and the court declines to intervene.

**Disposition**

22. In conclusion, I do not find any violation of the petitioners' rights and fundamental freedoms. Consequently the petition is dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 27<sup>th</sup> day of September 2013.

**D.S. MAJANJA**

**JUDGE**

Mr Okumu, Mr Oyoo, Mr Gitonga, the petitioners in person.

Mr Amadi instructed by Koceyo and Company Advocates for the respondent.