



**Mutisya & 173 others v Nairobi City County Government & another (Petition
E024 of 2020) [2022] KEELC 3428 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION E024 OF 2020**

**JO MBOYA, J
JUNE 30, 2022**

BETWEEN

FRANCIS KIMATHI MUTISYA & 173 OTHERS PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction and Background:

1. Vide the Petition dated December 2, 2020, the Petitioners herein approached the court seeking for Judgement to be entered against the Respondents on the following Prayers:
 - a. A Declaration that the intended Demolition and Eviction of the Petitioners from their business premises situated at Gacucu, Gikomba open air market is illegal, irregular, unprocedural and contrary to Articles 27(1) (2) and (4), 28, 29 (d) and (f), 40,43 and 47 of *the Constitution* of Kenya, 2010 and is therefore null and void.
 - b. A Declaration that any Intended Forceful Demolition or Eviction of the Petitioners from their Business premises situated at Gacucu, Gikomba open air market without a re-location option is illegal, oppressive, unconscionable, unconstitutional and violates the Constitutional rights of the Petitioners.
 - c. An order of Permanent Injunction restraining the Respondents whether by themselves, servants, agents and/or employees from threatening to evict, evicting, demolishing the Petitioner's structures and/or in any other manner interfering with the Petitioners' quiet and peaceful occupation of the premises known as Gacucu, Gikomba open air market.
 - d. General Damages.



- e. Costs of the suit.
 - f. Any other or further relief that this Honourable Court may deem fit and just to grant.
2. The subject Petition is premised on the grounds at the foot thereof and same is supported by the Affidavit of the 1st Petitioner sworn on the December 2, 2020, which is said to have been sworn for and on behalf of 173 others.
 3. Upon being served with the subject Petition, the 1st Respondent herein duly entered appearance and thereafter filed Grounds of opposition, in respect of which the 1st Respondent contended that the subject Petition was not only misconceived, but also legally untenable.
 4. On her part, the 2nd Respondent filed a Replying Affidavit sworn Stephen G Mwangi, namely, the Deputy Director in charge of Lands at the Nairobi Metropolitan Services (N.M.S.)

Deposition by the parties:

Petitioners' case:

5. Vide Supporting Affidavit sworn by one, namely, Francis Kimathi Mutisia, (hereinafter referred to as the deponent), same has averred and stated that the rest of the Petitioners and himself are traders dealing in second hands clothes within Gacucu Gikomba Area Market and that same have been operating and/or selling second hand clothes at the said open area market for over 40 years.
6. Further, the deponent has averred that during and in the course of carrying out their business at the said open area market, same have been duly paying the requisite levies, Business Permit fees and/or License fees to and in favor of the 1st Respondent.
7. Based on the fact that the deponent and the rest of the Petitioners have been paying levies and/or permit fees, to and in favor of the 1st Respondent, it was contended that the deponent and the rest of the Petitioners have therefore acquired lawful and legitimate basis, to occupy and/or operate business(es) within the Open-air market.
8. Nevertheless, the deponent has further averred that on or about the November 27, 2020, the Respondents herein through their employees and/or agents gave verbal instruction to the deponent and the rest of the Petitioners to forthwith vacate and/or move out of the open air Market and that in default, same would be forceful removed and/or Evicted therefrom.
9. Besides, the deponent has averred that the threat, which was issued by the employees and or agents of the Respondents herein, were also captured and/or disseminated vide one of the online publications.
10. At any rate, the deponent has proceeded to and annexed a copy of the said online Article to vindicate and/ or otherwise confirm the averment that indeed the reports and threats occurred.
11. On the other hand, the deponent has also averred that the verbal notice that was given to himself and the rest of the Portioners, were calculated to disrupt their business on the suit property, and in particular, that their business and livelihood would suffer.
12. Be that as it may, the deponent has averred that the Petitioners' business have been operating at the said Open Air market for a long time and that by the nature of their business, same have incurred Goodwill in financial institution, which have been lending monies unto them, for purposes of purchase and acquisition of Stock for the businesses.



13. Besides, it has been averred that based on the businesses being carried out and/or operated at the said open air market, the Petitioners have been able to repay the Loans and Financial Advancements, received from the various Financial Institutions.
14. In the premises, the deponent has averred and/or contended that the intended demolition and eviction by and/or at the instance of the Respondents herein, shall not only destroy their Businesses, but also deny same of the ability to procure and obtain Financial assistance from the Financial Institutions that have hitherto offered such assistance.
15. As a result of the foregoing, the deponent has averred that the threatened Eviction, which has not been preceded with sufficient Eviction Notice, in accordance of the law or at all, is bound to prejudice their livelihood and/or otherwise render same Destitute.
16. In any event, the deponent has further averred that the threat to demolish their premises at the open-air market and to evict them therefrom shall also constitute and/or amounts to breach and/or violation of the Petitioners' Social and Economic Rights as provided for and/or underscored vide the Provisions of Articles 42 and 43 of *the Constitution*, 2010.
17. Based on the foregoing, the deponent has therefore contended that the threatened demolition and the consequential Eviction would therefore violate and/or breach the Petitioners Rights and/or Fundamental Liberties and that based on the foregoing, it was/is therefore necessary for this Court to intervene and stop the imminent eviction and threatened demolition.
18. Suffice it to note that the deponent thereafter proceeded to and duly enumerated the particulars of breach that are alleged and/or otherwise averred to have been meted out against the Petitioners' herein.
19. Owing to the foregoing, the Deponent and the rest of the Petitioners herein, are now keen to procure and obtain an order of protection, so as to avert, prevent and/or prohibit the offensive activities threatened by the Respondents, jointly and/or severally.
20. Other than the foregoing, the Deponent has further averred that the rest of the Petitioners and himself shall suffer serious Financial loss and/or inconvenience, if the Orders sought herein are not granted.
21. In the premises and based on the foregoing, the Deponent, has therefore implored the Court to proceed and allow the Petition, as prayed and essentially, to protect and preserve the Petitioners' Socio-Economic Rights as underscored vide *the Constitution*, 2010.

Response by the 1st Respondent:

22. The 1st Respondent herein filed Grounds of opposition against both the Notice of Motion Application and the Petition. Nevertheless, the Grounds of opposition only raised issues of law and particularly, the Locus Standi of the Petitioners herein to file and mount the subject Petition.
23. On the other hand, the 1st Respondent also contended that to the extent that the Property on which the Open-air market stands and/or is located is Public land administered by the 1st Respondent, for and/or on behalf of the residents of the City County of Nairobi, the orders sought by the Petitioners herein cannot be granted.
24. Based on the foregoing, the 1st Respondent has therefore sought to have the subject Petition dismissed, primarily, on account that the Petitioners herein are not seized of the requisite Capacity, to lodge same.



Response by the 2Nd Respondent:

25. The 2nd Respondent filed a Replying Affidavit sworn by one Stephen G Mwangi, who described himself as the Deputy Director in charge of Lands at the Nairobi Metropolitan Services (N.M.S) and same averred that the area under reference constitutes and/or comprises of Public land and covers the area occupied by Pumwani Majengo Health Centre.
26. On the other hand, the Deponent has further averred that Pumwani Majengo Health center commenced its operations in the year 1995 as an STI Clinic targeting an estimate Population of 57, 113 People, with a total of 11, 423 Households.
27. Nevertheless, the Deponent has further averred that over time the hawkers operating at the open-air market have increased and that same have now encroached onto the area around the Health Center to the extent that the hawkers and their businesses have now interfered with access to the Health Center, as well as blocking the Sewerage serving the Health facility.
28. Be that as it may, the deponent has averred and reiterated that the land where the open-air market is located is Public land and hence the Petitioners' herein do not have any Title to and/or Interests in respect of same.
29. Other than the foregoing, the Deponent has averred that the National Government, albeit through the Nairobi Metropolitan Service have scheduled a Program and or Process to expand the Health Center and upgrade same to a Level 3 Hospital facility.
30. Premised on the intention of the National Government to upgrade the Health facility into a Level 3 Hospital, the Deponent has said that the National government was therefore in the process of preparing a program to facilitate the upgrade.
31. Nevertheless, the Deponent has averred that because the process of upgrade was still incomplete and pending finalization, no Eviction Notices have since been issued and/or served, whatsoever.
32. Besides, the Deponent has also averred that the Petitioners' herein have no lawful and/or legal rights to claim ownership and/or demand preferential treatment over and in respect of the use of the Suit property, which essentially, is Public Land.
33. At any rate, the Deponent has also contended that the Orders sought by the Petitioners, if granted, shall be prejudicial to the Rights of the National Government and in particular, her efforts to contain Covid- 19 Pandemic.
34. In the premises, it is the Deponent's averment that even though no Eviction notices have been served and/or issued, it would still be in the interest of justice that the Petitioners herein do vacate the subject open-air market and allow for the upgrade of the intended Level 3 Hospital facility.
35. Based on the foregoing, the Deponent has therefore averred that the Petitioners' herein have neither proved nor met the statutory threshold to warrant the grant of the Orders / Reliefs sought at the foot of the Petition.

Submissions by the Parties:

36. The Parties herein agreed and/or covenanted to canvas the Petition on the basis of Affidavit Evidence and thereafter to file written submissions in respect thereof.
37. Pursuant to and based on the foregoing agreement, the Court proceeded to and decreed that Parties do file and exchange written submissions within the stipulated and/ or circumscribed timelines.



38. Pursuant to foregoing directions, the Petitioners' herein proceeded to and filed their written submissions on the March 23, 2022, whereas the 2nd Respondent filed her Written submissions on the 25th May 2022. For clarity, the two sets of Submissions are on record.
39. Briefly, it is the Petitioners' submissions that same have been occupying and/or carrying out their second-hand business at the Gikomba Open Air space, for over 40 years.
40. Besides, it has been submitted that during the period of occupation and use of the suit property, the Petitioners, have been paying fees, business permit license, as well as Other statutory levies, to the 1st Respondent.
41. At any rate, the Petitioners' have submitted that during the period amounting to an aggregate of more than 40 years, same have acquired and/or attracted legitimate Claim to and/or legal interest over the Suit Property, and hence their Interest over the Suit Property are capable of protection under *the Constitution*, 2010.
42. On the other hand, the Petitioners' have also submitted that the on the November 27, 2020, same were issued with Verbal Notices and/or threat by the Respondents herein, whereby same were required to move out of the Suit property and demolish their structures therefrom and in default to comply, the Respondents threatened to Evict same.
43. Further, the Petitioners have also submitted that the threat and/or eviction notice, which is being challenged was verbally given and hence such threats, are not only unlawful, but also constitutes a breach of the Petitioners' Fundamental Rights and Liberties and in particular, the Rights under Articles 42 and 43 of *the Constitution*, 2010.
44. Other than the foregoing, the Petitioners' have also submitted that unless the threats by and/or on behalf of the Respondents herein are taken care of and/or averted, the Respondents' are bound and/or obliged to actualize the threats and essentially, proceed with the threatened Eviction.
45. In support of the foregoing submissions, the Petitioners have relied on various decisions, namely, *Susan Waitthera Kariuki & 4 Others versus The Town Clerk, Nairobi City County & 3 Others* (2013)eKLR, *Republic versus Cabinet Secretary, Ministry of Transport and Infrastructure & 3 Others Ex-parte Francis N Kiboro & 198 Others* (2015)eKLR and *Fatuma Khamis Bilal & 5 Others versus Kenya Railways Corporation & 6 Others* (2021)eKLR.
46. Premised on the foregoing, the Petitioners have therefore submitted that same have proved and/or established the existence of threats to and violation of their Fundamental Rights and thus same are entitled to protection under the law and particularly, under the Provisions of Articles 42 and 43 of *the Constitution*, 2010.
47. On her part, the 2nd Respondent has submitted that the Petitioners herein have not proved and/or established that their rights and/or liberties under *the Constitution*, 2010 have either been breached, violated and/or otherwise threatened with violation, in any manner.
48. Further, the 2nd Respondent has submitted that having alleged and/or contended that the verbal threats were issued by Employees and/or agents of the Respondents, it was therefore incumbent upon the Petitioners' to prove and/or authenticate that indeed such threats were made and if so, that the persons who made the threats, were indeed Employees and/or agents of the Respondents.
49. Nevertheless, the 2nd Respondent has submitted that other than the allegation that some verbal threats were made by Employees and/or servants of the Respondents, no evidence has been put forth to



identify the names and/or identities of the alleged employees and how the unidentified Employees, are associated with the Respondents herein or at all.

50. Besides, the 2nd Respondent has also submitted that having not proved that any Employee and/or servant of the Respondents herein issued and/or disseminated any threats, the Petitioners' have therefore failed to prove their claims, either as required by law or at all. For clarity, the 2nd Respondent has contended that the subject Petition is therefore misconceived and Legally untenable.
51. Notwithstanding the foregoing, the 2nd Respondent has also submitted that the suit property, in respect of which the Petitioners contend to have occupied and/or used for a period of more than 40 years, is indeed Public property and therefore the occupation and use thereof, cannot confer upon the Petitioners, any Legal and/or Lawful rights, capable of being protected under the law, including under *the Constitution*, 2010.
52. Be that as it may, the 2nd Respondent has submitted that by virtue of being Public property, the Respondents herein are entitled to recover vacant possession over and in respect of same, albeit subject to issuance and service of the requisite Eviction Notices upon the Petitioners.
53. In a nutshell, it is the 2nd Respondent's submissions that the Petitioners herein have failed to establish and/or prove the contention that the Respondents or any of the Respondents, have actually breached and/or otherwise threatened to breach and/or violate the Petitioners' Constitutional and Fundamental Rights or Liberties, or at all.
54. In support of the foregoing submissions, the 2nd Respondent has invoked and relied on the decision in cases of *Dr. Samson Gwer & 5 Others v Kenya Medical Research Institute (KEMRI) & 3 Others (2020)eKLR*, to explain that the Standard of proof laid at the doorsteps of the Petitioners and that in default of such proof, the Court is enjoined to dismiss the Petition.
55. In any event, the 2nd Respondent has further submitted that having not laid and/or placed before the Court Evidence to show any breach and/or violation of their Fundamental rights, the Petitioners herein cannot expect the court to proceed and make positive findings, in their favor, even though no Evidence has been adduced.
56. To vindicate the foregoing, the 2nd Respondent has submitted that a finding of breach and/or violation of Constitutional Rights cannot be made and/or rendered in vacuum insofar as it is important and/or imperative that evidence be adduced and/or placed before the Court.
57. In respect of the foregoing submissions, the 2nd Respondent has relied on and placed emphasis in the holding in the case of *Leonard Otieno versus Airtel Kenya Ltd* (2018)eKLR.

Issues for Determination:

58. Having reviewed the Petition, the Supporting affidavit, as well as the Responses filed by the Respondents and upon considering the written submissions lodged by the Parties, the following issues are pertinent and are thus germane for Determination;
 - I. Whether the Petitioners' herein have proved and/or established the breach and/or violation of their Constitutional/ Fundamental Rights.
 - II. Whether the Respondents herein can levy and/or undertake any Eviction without issuance of the requisite Statutory Notices.
 - III. Whether the Petitioners are entitled to the Reliefs sought.



Analysis and Determination:

Issue Number 1: Whether the Petitioners herein have proved and/or established the Breach and/or violation of their Constitutional/ Fundamental Rights.

59. It is the Petitioners' contention that on or about the 20th November 2020, same were issued with verbal threats by agents and/or servants of the Respondents herein, who demanded that the Petitioners' ought to vacate and move out of the suit property and in default, same would be evicted therefrom.
60. Though the Petitioners have adverted to having been issued with verbal threats by the Respondents' Employees and/ or agents, it is common ground that the Petitioners' herein have neither tendered nor adduced any evidence to show the details and/or identities of the alleged Employees and/or agents of the Respondents' alluded to or at all.
61. Secondly, it is imperative to note that other than alleging that Verbal Notices were issued by agents and/or employees of the Respondents, the Petitioners' herein have not placed and/or laid before the Court any basis of how same confirmed and/or otherwise, affirmed that the Nameless and Faceless Persons, were employees of the Respondents herein, or better still, that same were connected with the Respondents.
62. Other than the foregoing, it is also imperative to note that the 1st and 2nd Respondents' are two separate and distinct Entities, with own Employees and/or agents. In this regard, it is not enough to say that the Employees and/or agents, who allegedly issued the verbal threats, were Employees/agents of the Respondents, without clarifying which Respondent (sic) dispatched her Employees and/or agents to disseminate the purported verbal Notice.
63. Other than alluding to the issuance and dissemination of the verbal notice, the Petitioners herein have proceeded to and annexed an online Publication and/ or Article, which purports to confirm the existence of threat to Evict the Petitioners' from the Suit property.
64. To my mind, the online Publication or Article, whose authenticity and/or veracity is questionable, is not helpful to the Petitioners' case. Simply put, the online Article does not take the Petitioners' case any further.
65. Be that as it may, it is also worthy to note that like Newspaper Articles, online articles are not admissible in law and therefore, same have no Probative value, whatsoever and howsoever, save for where the Author of the Article is called and appears in Court as a Witness.
66. To vindicate the foregoing position, it is appropriate to take cognizance of the Decision in the case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* [2017] eKLR where the Court of Appeal held as hereunder;

“On our part, having considered the evidence on record and the law relating to admissibility and probative value of Newspaper cuttings, we find that a report in a Newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the *Evidence Act* which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence.

However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence



without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper.

On a comparative basis, in the Indian case of *Laxmi Raj Shetty -v-State of TamilNadu* 1988 AIR 1274, 1988 SCR (3) 706, the Supreme Court held that a newspaper is not admissible in evidence.”

67. In view of the foregoing, it is difficult to understand and/or appreciate how and on what basis the Petitioners’ herein came to the conclusion that (sic) the nameless Employees and/or agents were indeed Employees and agents of the Respondents herein.
68. Suffice it to note that the Burden of proving that the alleged verbal threats were disseminated and/or made by the Employees and/or agents of the Respondents’ laid at the doorsteps of the Petitioners who were therefore called upon to establish same on a balance of Probabilities.
69. Sadly though, the Petitioners herein have not met and/or discharged the Burden of Proof envisaged in respect of the subject matter, vide and by dint of the Provisions of Sections 107 and 108 of the [Evidence Act](#), Chapter 80, Laws of Kenya.
70. To underscore the necessity to prove a claim to the requisite standard, it is imperative to adopt and restate the holding of the Court of Appeal in the case of *Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard)* [2018] eKLR, Where the Court expounded on sections 107 and 109 of the [Evidence Act](#) as;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller vs Minister of Pensions* (1947) explained as follows:-“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

71. At any rate, the requirement that the Petitioners’ must satisfy the requisite Standard of proof in respect of their claims was underscored by the Supreme Court of Kenya vide the decision in the case of [Samson Gwer & 5 others versus Kenya Medical Research Institute & 3 others](#) [2020] eKLR, where the Court stated as hereunder;

- (49) Section 108 of the [Evidence Act](#) provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

- (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.
72. In a nutshell, I come to the conclusion that the Petitioners’ herein have neither established nor proved the claim pertaining to the issuance and/or dissemination of any verbal threats of Eviction by and/or on behalf of the Respondents, either as alleged or at all.

Issue Number 2 Whether the Respondents’ herein can levy and/or undertake Eviction without issuance and service of the requisite Statutory Notices.

73. Despite having found and held that no verbal threat of Eviction was ever issued and/or disseminated by Employees and/or agents of the Respondents herein, it is however important to address the issue herein.
74. For the avoidance of doubt, it is imperative to observe that prior to and or before any Eviction can be carried out and/or otherwise be undertaken against any occupants of any Public land, it behooves the concerned authority to liaise with the National Land Commission and to ensure that the requisite Eviction notice, which must be in writing, has been issued to and served upon the affected persons.
75. In respect of the foregoing observation, it is appropriate to refer to and underline the Provisions of Sections 152 (C) of the [Land Act](#), 2012 (2016), which provides as hereunder;
- 152C. Eviction Notice to unlawful occupiers of public land The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate , at least three months before the eviction.
76. Other than the foregoing provisions, it is also important to invoke and restate the provisions of Section 155 of the [Land Act](#), 2016, which provide as hereunder;
155. Unlawful occupation of land
- (1) Any person who, without, express or implied, lawful authority or without any right or license, under customary or statutory land law so to do—
- (a) occupies, or erects any building on any public land;
- (b) clears, digs, ploughs, cultivates, or grazes animals over, any public land or part of it; or



- (c) cuts or removes any timber or other produce on or from any public land or part of it, shall be taken to be in unlawful occupation of that land.
- (2) If, with respect to public land the Commission is of the opinion that a person is in unlawful occupation of public land, the Commission may serve on that person a notice in the prescribed form or give to that person an oral communication, in a language calculated to be understood by that person requiring that person to show cause as to why the person should not be required to vacate that land within any time and subject to any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters which the justice of the case may require, which may be specified in the notice or oral communication.
- (3) Any notice referred to in subsection (2) shall inform the person to whom it is addressed that the person has a right to be heard in connection with showing cause as to why the person should not vacate the land to which the notice relates.
77. From the foregoing provisions, there is no gainsaying that where there are occupants of Public land, the Petitioners' herein not excepted, neither the Respondents nor any Government authority can commence, carryout and/or undertake any Eviction, without issuance and service of prior Eviction notices upon the affected persons.
78. On the other hand, it is also worthy to underscore the fact that other than the service of such notice of Eviction, the Subject notice must also be published in the Kenya gazette, as well as one Newspaper with nationwide circulation. Besides, the intended Eviction must also be disseminated vide radio announcement in a language appropriate, at least three Months prior to the intended eviction.
79. Consequently, if and when the Respondents herein would be keen to remove the Petitioners' from the open-air market situate on the suit property, it shall be incumbent upon same to observe and adhere to the Provisions alluded to herein before.
80. Notwithstanding the foregoing, it is also open to the Respondents, where appropriate to engage with the Petitioners' and procure voluntary re-location thereof to such other open place, if any, is available.
81. Be that as it may, any process that is intended to and/or aimed at obtaining vacant possession over and in respect of the suit premises, must be one that takes into account the interests and welfare of the Petitioners, so much so that the Petitioners are not subjected to cruel and inhuman treatment in the course of recovery of vacant possession, even when the intended recovery is meant to pave way for Public use, inter-alia, the intended upgrade of Pumwani Maternity Hospital.
82. Suffice it to note, that the necessity to issue such Eviction notice and to treat the affected persons in a humane manner during recovery of vacant possession has hitherto been addressed by various courts.
83. In respect of the foregoing observation, it is imperative to adopt and endorse the holding of the Court in the case of Susan Waithera Kariuki & 4 others versus Town Clerk Nairobi City Council & 3 others [2013] eKLR, where the Court stated as hereunder;

“However, the petitioners are entitled to be given adequate notice to vacate the said public road. They cannot be required to vacate the places said to be their homes within a matter of hours. Even though they are in occupation of a public road, they deserve to be given adequate notice to vacate the said premises.’



84. In a nutshell, even though I have found and held that there was no threat of Eviction in the manner alluded to by the Petitioners, it is important to underscore the fact that the Respondents herein shall be obliged to comply with and/or adhere to Sections 152 (C) and 155 (2) and (3) of the Land Act, 2012 (2016) prior to levying any Eviction against the Petitioners herein.

Issue Number 3 Whether the Petitioners are entitled to the Reliefs sought.

85. The Petitioners' herein had sought for various reliefs at the foot of the Petition dated the 22nd December 2020, inter-alia, that the intended demolition and eviction of the Petitioners from their business premises situated at the Gikomba Air Market is irregular, unlawful and otherwise legally untenable.

86. However, while addressing and/or dealing with issue Number one herein before, I found and held that the Petitioners' had not established and/or otherwise proven that there was any intention to evict same from the suit premises, either in the manner claimed or at all.

87. To the extent that the threatened demolition and eviction, was never proven and/or established, as required vide section 108 and 109 of the Evidence Act, the declaratory order sought herein cannot issue.

88. To my mind, a declaratory order cannot issue in vacuum where no sufficient or credible evidence have been laid before the Court. Essentially, the Claimant must prove his/ her case to the requisite Standard before same can be entitled to the Declaratory Orders, if any and where appropriate.

89. To buttress the foregoing observation, it is worthy to take note of and underscore the holding of the Court in the case of Leonard Otieno Vs. Airtel Kenya Limited [2018] where the court held thus:

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.

90. On the other hand, the Petitioners had also sought that the court be pleased to issue a declaration that the intended forceful eviction from the business premises situate at Gikomba Air Market, without a relocation option is illegal, oppressive and unconstitutional.

91. As pertains to the foregoing declaration, it is worthy to note that the Petitioners' herein are Business persons whose occupation and use of the Public open air market, has been and is premised on the mutual understanding between same and the 1st Respondent herein and not otherwise.

92. At any rate, it is worthy to recall that the Petitioners' occupation and use of the subject open-air market has also been on the basis of License for which the Petitioners' continued to pay various levies and business permits to and in favor of the 1st Respondent.

93. Based on the foregoing, it is evident and/or apparent that the Petitioners' herein do acknowledge and appreciate that same are licensees and therefore have no accrued rights and/or interests over and in respect of the Suit property, namely, the open-air market.

94. Given that the Petitioners' herein have not accrued rights and/or entitlements over and in respect of the suit property, it would be inconceivable to imagine and/or perceive that when the license existing



between same and the 1st Respondent is duly terminated, subject to adherence with the provisions of the law, that either the Respondents herein or, better still, the 1st Respondent has any obligation to relocate same elsewhere.

95. To my mind, the position as pertains to and/or concerning the Petitioners is better amplified vide the holding of the Court in the decision in the case of *Faraj Maharua v JB Martin Glass Industries & 3 others* [2005] eKLR, where the Court stated as hereunder;

Thirdly, the Temporary Occupation Licence issued in 1926 could not oust the Certificate of Title granted under the Registration of Titles Act. The appellant does not possess title under the Act.

It is indeed settled law in Kenya that a Temporary Occupation Licence to occupy Government Land is not sufficient to create or transfer title to the grantee or his personal representative. As was stated in *Runda Coffee Estate Ltd v. Ujagar Singh* [1966] E.A. 564:

“It is the essence of a licence of this nature that it is personal to the Licencee and creates no interest which can be disposed of by the Licencee. As has been said well over 100 years ago, it creates nothing substantial which is assignable.”

We would agree therefore, with the learned Judge that the licence to occupy the suit property came to an end upon the death of Effendi Maharus and his widow and as the appellant had nothing to show for the continued occupation of the suit land, his occupation as such amounted to trespass as against the registered proprietor.

96. Guided by the reasoning in the foregoing decision, it is my considered view that subject to issuance and service of the requisite Eviction notices as envisaged under the *Land Act*, 2012 (2016), the Respondents herein would have no legal obligation to relocate the Petitioners' to any other open-air market or at all.
97. Simply put, it would be the obligation of the Petitioners', in their capacities as Business persons, who have been paying Business permit license and/or fees to the 1st Respondent to find an alternative place to carryout and/or conduct their business, of course, subject to the agreed terms with the landlord, inter-alia, payment of license and or rents where appropriate.
98. Finally, the Petitioners herein have also sought for an order of Permanent injunction to restrain the Respondents from Evicting same from the suit premises and/ or obtaining vacant possession of the Suit Property.
99. As pertains to the prayer for Permanent injunction, all I wish to say is that subject to issuance and service of the requisite statutory notices, as by Law provided, the land owner, in this case the 1st Respondent would be entitled to recover vacant possession and to put the suit property to such Public use as it was intended.
100. In any event, it is my considered view that an order of Permanent injunction cannot issue to restrain and/or prohibit the registered owner of the suit property from recovering vacant possession, unless there exists extremely exceptional and peculiar circumstances, to warrant the issuance of such an Order. Unfortunately, no such exceptional circumstances have been proven in respect of the subject matter.
101. Be that as it may, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court of Appeal observed as hereunder;

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.



102. In view of the foregoing, I come to the conclusion that the Petitioners' herein are not entitled to the Reliefs sought at the foot of the Petition herein.

Final Disposition:

103. Having evaluated and or reviewed the issues for determination and having duly considered same, it must have become apparent and/or evident that the Petitioners' claim herein has not been proven to the requisite Standard of proof as established by and/ or under the Law.
104. Suffice it to note, that even in Constitutional Petitions, the Petitioners are charged with both the Evidential and Legal burden to prove and establish their case, in accordance with the provisions of Section 107 and 108 of the *evidence Act*, Chapter 80 Laws of Kenya.
105. Consequently and save for the fact that the Petitioners cannot be evicted from the suit Property without due compliance with and/or adherence to the provisions of Sections 152 (C) as read together with Sections 155 (2) and (3) of the *Land Act*, 2012 (2016), the Petition herein is unmeritorious. In a nutshell, the Petition be and is hereby Dismissed.
106. In respect of the issue of costs, it is imperative to take into account that the subject Petition gravitates around Public litigation and pursuit of (sic) Economic and social rights by concerned citizens.
107. In the circumstances, the order that commends itself to me, is that Either Party shall bear own Costs of the Proceedings herein.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022.

HON OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Kabue for the Petitioners

Ms. Achola h/b for Mr. Kithi for the 1st Respondent

Mr. Allan Kamau for the 2nd Respondent

