



**Gatuma & 19 others v Karithi & another (Environment & Land Petition
16 of 2019) [2024] KEELC 3246 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 16 OF 2019**

CK YANO, J

FEBRUARY 8, 2024

BETWEEN

MICHAEL GATUMA & 19 OTHERS PETITIONER

AND

VICTOR KARITHI 1ST RESPONDENT

COUNTY GOVERNMENT OF MERU 2ND RESPONDENT

JUDGMENT

Introduction

1. By a Petition dated 18th June, 2019 and amended on 17th May, 2022, the Petitioners are seeking that judgment be entered in their favour against the respondents jointly and severally for:-
 - a. A declaration that the actions of the respondents are illegal, are in violation of the fundamental rights of the Petitioners and the residents of Karamene area and Athwana Ward and that the same is injurious to their health.
 - b. An Order of Permanent injunction restraining the respondents and/or their agents or servants or whosoever from carrying on with the construction of the proposed market project at the proposed area.
 - c. That a permanent injunction be issued restraining the respondents from subdividing Land Parcel Number 215 Athwana/Akithi Section in Karamene Area within Athwana Ward into individual plots and allocating them to individuals as this land is reserved for a market.
 - d. Costs of the suit and interest.
 - e. Any further or better relief this Honourable court may deem fit to grant.



2. In support of the Petition, the Petitioners filed an affidavit in support of the Petition dated 18th June 2019 sworn by Michael Gatuma, Domisiano Mwilaria, Rose Mwakiuna, Sebastiano Ikiao and Mwit Nicholas who state that they are the representatives of the petitioners herein duly authorized to swear the affidavit and therefore competent to swear the affidavit that they have read the contents of the Petition herein and confirm the correctness of the facts contained therein, that this is the first case they are bringing against the respondents and none is pending nor finalized in court and make the affidavit in verification of the Petition.
3. The Petition was opposed by the 2nd respondent through a replying affidavit sworn on 20th August, 2019 by Catherine Kithinji, the Chief Officer, Ministry of Trade Meru County.

Petitioners' Case

4. The Petitioners are residents of Karamene Area in Athwana Ward within Tigania West Sub-County, Meru County. It is the Petitioners case that the respondents are in the process of putting up the proposed Karamene Market on a public land parcel No. 215 Athwana/Akithi Section measuring 13 metres by 148 metres in size without engaging the residents or through public participation and without carrying out an Environmental Impact Assessment or first obtaining approval/licence from the National Environmental Management Authority (NEMA).
5. The Petitioners aver that the said market is being proposed in an area less than 100 metres from Waso Mara River known for experiencing frequent flooding and that there are high possibilities that the proposed market will occasion constant pollution to the river that supplies both drinking and farming water to the residents and their livestock who may be exposed to dangers. The Petitioners also fault the respondents for not seeking their views while considering putting up the project while aware that the intended market is between two major markets namely Ngundune and Muriri which are 1Km and 2KM away respectively on each side and which adequately serves the residents of the area, thus rendering the intended market not to be a priority on that parcel of land as it will not be of benefit to the public. It is also contended that the actions of the respondents, if allowed to stand, pose grave danger to the residents of Karamene and Athwana as the size of the land will not be sufficient for proper planning for putting in place waste disposal mechanisms. The Petitioners state that the proposed project is injurious to the good health and well being of the inhabitants of Athwana and those on downstream as their farming activities will be halted.
6. In their submissions dated 14th November, 2023 filed through the firm of G.M Wanjohi, Mutuma & Co. Advocates, the Petitioners submit that the respondents have now illegally subdivided the suit land into 14 plots which have been illegally allocated to individuals who have now started constructing fences and illegal structures. It is the Petitioners' submissions that the ongoing activities on the suit land whether it is the construction of the market or the allocation to individuals is illegal as it is contrary to the provisions of the Physical Planning Act for being carried out without first obtaining the change of user from residential to commercial and being put up without public participation from the area residents and without obtaining approval/license from NEMA. The Petitioners further argue that the construction of the market and its presence is against public policy and a blatant breach of the residents' constitutional and fundamental rights to privacy, dignity and healthy environment.
7. The Petitioner's advocate also summarized the response made by the 2nd respondents.
8. On whether the court should grant the orders sought, learned counsel for the Petitioners cited the provisions of Article 10(2) of *the Constitution*, Section 30(3), (g), 87 and 115 of the County Government Act and relied on the case of Simeon Kioko Kitheka & 18 Others Versus County Government of Machakos & 2 Others [2018]eKLR and Kiambu County County Government & 3



Others Versus Robert N. Gakuru & Others [2017] eKLR and submitted that the respondents did not avail any documents to show that they conducted public participation.

9. On the issue of clean and healthy environment, the Petitioners' counsel cited Article 42 of *the Constitution* and relied on the case of Adrian Kamotho Njenga Versus Council of Governors & 3 Others [2020]eKLR. They also cited the provisions of Sections 3 and 58 of the Environmental Management and Coordination Act and submitted that the petitioners are entitled to a clean and healthy environment which right includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures particularly those contemplated in Article 69 of *the Constitution*. Further, that Article 70 of *the Constitution* empowers any person who alleges that a right to a clean and healthy environment has been infringed or is threatened to apply for redress from the court in addition to any other legal remedies available in respect of the matter. That under Article 70 of *the Constitution*, the court may make an order or give directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment and may compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. It is further submitted that the environment impact assessment report produced by the Petitioners concluded that the proposed project will have more negative effects than positive ones. That the respondents did not avail any material to contravene the petitioners' averments that they did not comply with the Environment Management and Coordination Act and Physical Planning Act. The Petitioners counsel submitted that guided by the above legal provisions and authorities, the Petitioners have established a prima facie case and urged the court to allow the Petition as prayed.

2nd Respondent's Case

10. It is there 2nd respondents' case that the Petition is premature, speculative and not based on any cogent evidence to support the alleged plan by the County Government to construct the alleged Karamene Market in Athwana Location. It is averred that the 2nd respondent has not budgeted nor planned for establishment of the alleged market for the financial year 2019/2020 and therefore the perceived establishment of a market in Karamene Location is unsubstantiated and unfounded.
11. The 2nd respondent states that the only development project in the said parcel of land NO. 215 Athwana/Akithi Section is a Public toilet which was constructed by the area MCA through the Ward development fund to serve and positively benefit members of the public and that the Petitioners have not demonstrated how their rights and that of other members of public have been infringed on by the same. It was pointed out that the suit land was reserved and earmarked by the defunct Nyambene County Council, the predecessor of the 2nd respondent as a market place for the past 40 years, and the 2nd respondent denied that any plots have been fenced and that no developments have been commenced in the said land apart from the said public toilet. The 2nd respondent states that should there be need to put up a market in the suit land in the future, there are legal procedures that the law has provided to be followed. It further states that there are no plans in place to have the suit land subdivided and allocated to members of the public.
12. In their submissions dated 15th December, 2023 filed through the firm of Laichena Mugambi & Ayieko Advocates LLP, the 2nd respondent submitted that as the custodian of Public Land as mandated in *the Constitution* of Kenya 2010, and the County Government Act there are procedures and requirements through the law that needs to be followed for one to acquire public land. It is further submitted that the Petitioners have not presented any evidence to show anything close to their allegations that the land has been subdivided and allocated to some members of the public.



13. The 2nd respondent reiterated that the only construction in the said parcel of land is a public toilet that was being constructed by the then area MCA and to which the court allowed its progression vide its ruling of 31st July, 2019. The 2nd respondent's counsel reiterated the contents of the replying affidavit filed by the 2nd respondent and submitted that court orders are not issued in vain and a court order must serve a purpose. It is their submissions that the orders sought in the Petition herein are not sustainable and therefore cannot issue.
14. The 2nd respondent's counsel submitted that the documents relied on by the petitioners' do not support their allegations, and do not even mention Karemene Market, instead rubber stamps the 2nd respondent's position that no allocation and/or proposition exist. It is submitted that the orders sought by the Petitioners have no consequence and therefore moot. The 2nd respondent's counsel relied on the case of Samuel Kimani & Another Versus Dominic Kamuri Karanja [2022]eKLR and submitted that the Petitioners have failed to put before the court sufficient evidence that will leave no doubt that their allegations are true and urged the court to dismiss the Petition with costs to the 2nd respondent.

Analysis And Determination

15. I have considered the Petition, the response and the rival submissions. The issues falling for determination in my view are:-
 - a. Whether there was proof of violation of the Petitioners' rights to a clean and healthy Environment
 - b. Whether the Petitioners are entitled to the orders sought in the Petition.
16. In order to be able to appreciate the issues raised in the Petition, one has to go through all the paragraphs in the Petition. What I can deduce from amended Petition is that the Petitioners are alleging that the respondents were in the process of putting up a proposed Karamene market on a Public Land Parcel No. 215 Athwana/Akithi Section without engaging the residents through public participation. The Petitioners also allege that the proposed project is being put up without first obtaining the necessary approval or license from the National Environmental Management Authority (NEMA). The Petitioners have further alleged that the respondents have subdivided the said land which is public land, and allocated the same to individuals who have started constructing fences and illegal structures. The Petitioners allege that the respondents' actions if allowed to stand, pose grave danger to the residents of Karemene and Athwana.
17. Whereas the Petitioners have cited various Articles of *the Constitution* and allege infringement of their fundamental freedoms and rights, the bottom- line is that they are challenging the alleged construction of proposed Karamene Market without subjecting the same to public participation and the Environment Impact Assessment process.
18. Article 10 of *the Constitution* which binds all state organs, state officers, public officers and all persons in their discharge of public functions, highlights public participation as one for the ideals and aspirations of our democratic nation. Public participation is also provided under Section 30, 87 and 115 of the County Government Act. In addition, Article 42 of *the Constitution* and Section 3 of the Environmental Management and Coordination Act provide that every person has the right to a clean and healthy environment, and has the duty to safeguard and enhance the environment. Further, Section 58 of the Environmental Management and Coordination Act provides that a proponent of a project must submit an Environment Impact Assessment Report to the National Environment Management Authority. Under regulation 4(1) of the Environmental (Impact Assessment and Audit) Regulations 2003, no proponent shall implement a project likely to have a negative environment



impact or for which an environmental impact assessment is required under the Act or regulations, unless an Environmental Impact Assessment has been conducted and approved in accordance with the regulations.

19. In the instant case, the Petitioners alleges that the respondents are in the process of putting up Karamene Market without engaging the area residents. However, there is no evidence to confirm that the proposed market is in the process of being put up, let alone constructed. In their affidavit in support of the Petition, the deponents simply confirmed the averments contained in the Petition. The Petitioners have not produced any evidence to support their allegations against the respondents. In opposing the Petition, the 2nd respondent clearly states that it has even not budgeted for the establishment of the alleged Karamene Market. The Petitioners did not challenge this averments. It is Trite Law that he who alleges bears the burden of proof. In the absence of any credible evidence, the Petitioners averments in the Petition remain unsubstantiated and cannot be relied by the court to issue the orders sought. It has also not been shown that the land in question has been subdivided and allocated to individuals as alleged by the Petitioners. From the Material on record, the only construction done was a public toilet which the court allowed to proceed vide a ruling made on 31st July, 2019.
20. From the material placed before this court, it is evident that the allegations by the Petitioners are too generalized and lacked the necessary backing to afford it credence. I am in agreement with the 2nd respondent's submission that the entire Petition is based on speculative and unfounded allegations which have not been proved. The court will certainly not make a decision on such a grave matter touching on the clean and healthy environment and public land based on speculations and allegations which have not been proved.
21. In the final analysis, the upshot of the foregoing is that this Petition lacks merit and is dismissed.
22. On costs, I have noted that the Petitioners have only sought declaratory and injunctive orders. There is no prayer for compensatory damages for their alleged violation of their Constitutional rights. It may therefore be concluded that the petitioners' concern was simply to protect the Environment and public land. In the circumstances, I order that parties bear their own costs.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF FEBRUARY, 2024

HON. C. YANO

ELC – JUDGE

In the presence of:-

Court Assistant: Kiragu

Mr. Munene holding brief for Ayieko for 2nd Respondent

Ms. Onyango holding brief for Mutuma for Petitioner

No appearance for 1st Respondent

