



REPUBLIC OF KENYA



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Wanjohi & another v County Government of Uasin Gishu (Petition E006 of 2022) [2023] KEELC 18025 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18025 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
PETITION E006 OF 2022**

JM ONYANGO, J

JUNE 6, 2023

BETWEEN

PETER KIMANI WANJOHI 1ST PETITIONER

ELDORET MARKET TRADERS ASSOCIATION 2ND PETITIONER

AND

COUNTY GOVERNMENT OF UASIN GISHU RESPONDENT

RULING

1. The Petitioners commenced this suit vide a Petition dated 26th December, 2022 alleging that the Respondents had abruptly closed Champions Market and Sixty Four Market in Eldoret Town without affording the Respondent to opportunity to express their views about the proposed closure thus violating the principle of public participation as ordained in Article 10(2) of the *Constitution*. The Respondents further alleged that the closure of the two markets was in violation of Article 47 of the *Constitution* and section 5(1) of the *Fair Administrative Actions Act* which required that the Respondents be issued with a notice and that they be given an opportunity to state their opinion.
2. The Petitioners aver that being regular traders as defined in section 2 of the *Uasin Gishu County Trade and Markets Act*, No. 1 of 2022, and having paid for licenses and other fees they had a legitimate expectation that they would be allowed to carry on their business freely without any unreasonable interruptions and that they would be accorded all the necessary protection and support appurtenant to their business.
3. The Petitioners allege that the Respondents actions are laced with irrationality, unreasonableness. They aver that the Respondents decision close the markets resulted in loss of stock comprising of fresh produce and other agricultural products of economic value thus violating their right property as enshrined in Article 40 of the *Constitution*.



4. Additionally they aver that the decision to relocate them to Kahoya and Kimumu Markets which are congested and have no proper sanitary facilities have caused the Petitioners to operate under circumstances that violate their right to a clean and healthy environment as provided under Article 42 of the Constitution.
5. The Petitioners thus seek the following reliefs:
 - a. A declaration that the decision to close Champions market and Sixty Four market as communicated by the Deputy Governor at the press briefing held on 18th November, 2022 outside the County Offices at 1048 a.m or thereabouts and as affirmed in a public address in Eldoret town on the same date, at 10.48 am or thereabouts is unconstitutional, null and void and of no effect whatsoever.
 - b. A declaration that the decision to close the two markets aforesaid and failure to reopen them within the defined period of time ostensibly as a response to the security situation, was irrational and excessive and disproportionate under the circumstances.
 - c. A declaration that the decision to relocate the traders including members of the 2nd Petitioner to Kahoya and Kimumu markets or to any other market other than Champions and Sixty Four communicated and affirmed as above is unconstitutional, null and void and of no effect.
 - d. A declaration that the decision to relocate the traders including members of the 2nd Petitioner from Champions and Sixty Four markets without conducting an environmental impact assessment of the implications of such a decision was contrary to sections 58 and 59 of the Environmental Management and Coordination Act and as such constituted a violation of or threat to the right to a clean and healthy environment.
 - e. A Judicial Review Order of Certiorari calling up the said decisions (closing the markets and relocating the traders to other markets) into this Honourable Court for purposes of their being quashed.
 - f. An order of mandatory injunction compelling the Respondents to restore the traders including the members of the 2nd Petitioner into the two markets and/or otherwise compelling the Respondents herein to re-open and allow access to, and use of the Eldoret Champions and Sixty Four Markets located in Eldoret town by traders including members of the 2nd Petitioners herein.
 - g. An order that members of the 2nd Petitioner are entitled to such compensation as may be assessed by this court.
 - h. Such other or further relief as the court may deem fit to grant.
 - i. Costs of the Petition.
6. Contemporaneously with the Petition, the Petitioners filed a Notice of Motion of even date seeking the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent



- e. Pending the hearing and determination of this Petition, a conservatory order does issue to suspend the continued enforcement of the decision and/or declaration ordering the closure Champions Market and Sixty Four market, as well as relocating traders including members of the 2nd Petitioner to market locations in Kimumu, Kahoya and elsewhere as announced via press conference and confirmed via an address to the public by the Deputy Governor on 18th November 2022.
 - f. Pending the hearing and determination of this Petition, an order does issue compelling the Respondents herein to re-open and allow access to, and use of the Eldoret Champions and Sixty Four Markets located in Eldoret town by traders including members of the 2nd Petitioners herein.
 - g. Costs of and occasioned by this application be provided for.
7. The application is premised on the various grounds set out in the Notice of Motion and the Supporting affidavits of Peter Wainaina, Nahashon Kimutai Kiprop, Peter Kimani Wanjohi and Jecinta Kirigo.
 8. In his Supporting affidavit, Peter Wainaina who is the Organizing Secretary of the 2nd Petitioner and a trader at Eldoret Champions market recounted the events leading to the closure of the two markets. He averred that on 17th November, 2022, County enforcement officers (askaris) conducted a swoop of handcart fruit vendors commonly known as “bang bang” outside Eldoret Champions Market. The bang bang vendors ganged up to resist the operation and a fight ensued between them and the county askaris. The County askaris loaded the vendors’ fruits on their lorry and drove off. They returned a short while later with reinforcement and engaged the vendors in a fight. A group of street boys took advantage of the situation and joined in the fight and caused mayhem, looting shops and destroying property. The county askaris were forced to call the Police who came and managed to restore order after arresting some street boys and dispersing the crowds.
 9. The County Commissioner then went to the area around the market and addressed the traders assuring them of their security and promising to protect their property. However, on the morning of 18th November, 2022 at about 3.00 am county askaris accompanied by gangs of civilians intercepted lorries that had brought farm produce to the market and took their cargo. The askaris then locked the gates to the markets and prevented the 2nd Petitioners’ members and anyone who tried to access the market.
 10. Later that day on 18th November, 2022, the Deputy Governor announced that Eldoret Champions Market and Sixty-Four market had been closed for seven days. The traders who were denied access to the markets were unable to remove their goods and most of them which consisted of perishable foodstuff got spoilt resulting in heavy losses.
 11. The traders were directed to relocate to Kahoya and Kimumu markets which are small and unable to accommodate the large number of traders. Furthermore, the said markets do not have enough health amenities thus exposing the traders to health hazards. He has annexed a list of the members of the 2nd Petitioner, letters of allotment of the market stalls for some of the said members and rent payment receipts. It is Mr. Wainaina’s contention that the actions of the Respondent violated his constitutional rights as well as the rights of the members of the 2nd Petitioner.
 12. In his affidavit Peter Kimani Wanjohi who is the Member of County Assembly for Huruma Ward where Champions and Sixty-Four markets are located averred that some of his constituents who are members of the 2nd Petitioner and traders at the two markets went to see him after the said markets were closed and lamented about the manner in which they had been treated on 17th and 18th November, before the markets were closed. He thereafter visited the said market and he was shocked at what the



- sight of unsecured stalls piled with various types of agricultural produce including fruits, vegetables, poultry and fish all in different states of decay signifying that the traders were not given an opportunity to remove their stock. Photos of the same are annexed to his affidavit as annexures.
13. Mr. Wanjohi depones that he visited Kahoya and Kimumu markets where the traders have been relocated to and noted that the said markets are small and cannot accommodate the large of number of traders who were displaced from Champions and Sixty-Four Markets. He noted that the Kimumu and Kahoya markets are open-air markets with inadequate ablution/sanitation facilities thus exposing the traders to the elements as well as health hazards.
 14. He complains that the traders were not given any notice nor were their views sought with regard to the closure of Champions and Sixty-Four markets and their relocation to alternative markets. He also laments that despite the promise by the Respondent that the market would be re-opened after seven days, this has not happened. He avers that as a result of the Respondents actions the traders' rights have been violated and they have suffered significant losses.
 15. In his affidavit Nahashon Kimutai Kirop who is the Chairman of the Kerio Valley Fruit Sacco recounts how their 13 lorries which were delivering stock to Champions Market on the morning of 18th November, 2022 had their consignment confiscated by County askaris resulting in losses to the tune of Kshs.7.7 million. He avers that owing to the closure of Champions and Sixty Four Markets, their producer-consumer chain has been broken thus adversely affecting their business.
 16. In her affidavit, Jecinta Kirigo, one of the traders at Champions Market avers that on the morning of 18th November, 2022 she lost 13 bags of carrots which she had paid for and which had just been off-loaded as they were confiscated by county askaris.
 17. The application was strenuously opposed through the affidavit of Abraham Mengich, the Chief Officer, Trade and Industrialization Department of the Respondent, sworn on 9th January, 2023. He avers that he was served with a 14 -day statutory Notice on 4th November 2022 under section 118 of the *Public Health Act* Cap 242 of the Laws of Kenya by the Health Department, Uasin Gishu County that there was a nuisance that required his Department to carry out major renovations of the market.
 18. He avers that he was unable to comply with the said notice as the Petitioners organized violent protests. The Public Health officials subsequently registered a complaint following which he was arraigned in court and charged with the offence of failing to comply with a statutory notice under section 119 of the *Public Health Act* vide CM Criminal Case No. 1019 of 2022.
 19. He averred that Champions and Sixty-Four markets were in a deplorable state and were unfit for human habitation and are currently undergoing renovations pursuant to the orders issued in the criminal case whereby the court ordered that the two markets be closed for 30 days for renovation. He further states that the said renovations will ensure a clean, habitable and healthy environment for the traders, including the Petitioners and the residents of Uasin Gishu County.
 20. It is his contention that allowing the application would conflict with the orders issued by the court in CM Criminal Case No. 1019 of 2022 which were extended on 23rd December, 2022.
 21. He avers that the Respondent has in the meantime provided alternative market areas and relocated genuine traders to those markets to allow the Respondent to implement its mandate under Part 2 of the 4th Schedule to the *Constitution*. He avers that on 2nd September the Respondent issued notices to all traders notifying those who had been allocated market stalls before 2019 that their occupancy term had lapsed and that they needed to re-apply for the same but only a few traders complied.



22. He refutes the allegation contained in paragraphs 3-23 of Peter Wainaina's affidavit terming them false and motivated by ulterior motives.
23. It is his contention that the orders sought by the petitioners go against the spirit of the [*Public Health Act*](#) which seeks to ensure that conditions which are a nuisance or liable to be injurious or dangerous to health are not permitted.
24. The Respondent's responded to the Replying affidavit through a Further Affidavit sworn by Peter Wainaina on 11th January, 2023.
25. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions.

Petitioners' Submissions

26. The Petitioners submitted that they had met the threshold for the grant of conservatory orders suspending the closure of the Champions and Sixty-Four markets pending the hearing of the Petition. They relied on the case of *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* where Onguto J set out the 5 principles to be considered in the grant of conservatory orders. The said principles are:
 - i. The applicant must demonstrate that he has a *prima facie* case with a likelihood of success
 - ii. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of Rights.
 - iii. Whether the substratum of the Petition will be rendered nugatory if the conservatory orders are not granted.
 - iv. Whether it is in the public interest to grant the conservatory orders
 - v. Whether the court should exercise its discretion in favour of the applicant.
27. It was submitted that the Petitioners had demonstrated that they had a *prima facie* case with a probability of success as the decision to close the two markets was made abruptly without public participation or notice to the traders thus violating the Petitioners' right to fair administrative action.
28. It was contended granting the conservatory orders would enhance the Petitioners' property rights and enable them to enjoy other rights such as the right to health. The Applicants submitted that the Respondent had always wanted to displace the traders from Champions and Sixty-Four markets and if they were not stopped in their tracks the substratum of their suit would be destroyed and their suit rendered nugatory.
29. With regard to public interest, it is the Applicant's contention that the closure of the two markets which are located in the Central Business District has adversely affected members of the public and hotel owners who shopped at the markets due to their centrality and farmers who supplied their farm produce to the market. They also argue that relocating the traders to Kimumu along the Eldoret-Webuye Highway poses a great risk to traders and shoppers.
30. On the exercise of the court's discretion, the Respondent urged the court to consider the conduct of the Respondent. They submitted that the Respondent had promised to reopen the market after seven (7) days but more than four (4) months later they have not communicated with the Petitioners regarding the reopening and this has prejudiced the traders. They are of the view that the Respondents have not



demonstrated any good faith in dealing with the Applicants who committed no wrong yet their rights have been violated.

31. On whether the court should issue a mandatory injunction, the Applicants relied on the case of *County Assembly of Machakos v Governor, Machakos County & 4 Others* [2018] eKLR where the court restated the principles laid down in the case of *Kenya Breweries Ltd & Another v Washington Okeyo* [2002] 1.E.A 109 that a mandatory injunction should not be granted at an interlocutory stage unless there are special circumstances and only in the clearest of cases.
32. It was their contention that the Applicants have established that there were no proper grounds to justify the closure of the markets and secondly they have demonstrated that the Respondent did not follow the proper procedure as the markets were closed abruptly without notice and without public participation. Furthermore, even though the closure of the markets was supposed to be for purposes of sanitization of the markets, the said sanitization has not taken place. The alternative markets to which the traders have been relocated are unsuitable as they are congested and lack adequate ablution facilities thus exposing that traders to health risks.
33. The applicants urged the court to exercise its supervisory jurisdiction with respect to Criminal Case No. 1019 of 2022.

Respondent's Submissions

34. On their part, the Respondents relied on the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR for the proposition that conservatory orders unlike injunctions bear a more public law connotation and are intended to facilitate a more ordered functioning within public agencies and uphold the adjudicating authority of the court in public interest. They should therefore be granted based on public interest, the constitutional values, proportionate magnitude and priority levels attributable to a case.
35. With regard to the principles that guide the court in granting conservatory orders, the Respondents relied on the case of *Lipisha Consortium Ltd & Another v Safaricom Ltd* [2015] eKLR.
36. Regarding the question of a prima facie case, with a likelihood of success, the Respondents relied on the definition of a prima facie case in the case of *Mrao v First American Bank of Kenya Ltd* [2003] KLR that a *prima facie* case is one which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite part as to call for an explanation or rebuttal from the latter and that the applicant must establish that the right has been infringed by the defendant.
37. The Respondent submitted that the applicants had not furnished any proof that their rights had been violated. It was the Respondents' contention that the markets capacity had been overstretched as Champions markets was supposed to house 998 traders and Sixty-Four market was supposed to house 311 traders yet both markets had 6000 traders causing a strain on the facilities including latrines, water drainage and garbage storage cans.
38. As a consequence, the markets were infested with rodents, the drainage and toilet flushing systems was blocked, and the security around the markets deteriorated due to the invasion of street urchins. They submitted owing to the uninhabitable state of the markets they were issued with a Notice dated 4th November, 2022 under Section 118 of the *Public Health Act*, requiring them to remove the nuisance in the markets. When they failed to do so the Chief Officer, Trade and Industrialization Department of the County Government was charged in court prompting them to close the markets for renovation.



39. The Respondent submitted that they issued the traders with a Notice dated 14th October, 2022 to remove movable stalls and handcarts from the markets. It was their contention that only 180 traders had renewed their licenses and therefore the rest of the traders could not argue that they had a legitimate expectation to continue trading at the markets.
40. It was the Respondent's submission that the Applicants had not established a *prima facie* case and the court ought to issue orders that favour the protection and conservation of the environment in line with the principle set out in section 3 of EMCA. Reliance was placed on the case of *Association of Manufacturers and 2 others v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others* [2017] eKLR.
41. The Respondent further submitted that the Petitioners had not demonstrated that the substratum of the suit would be rendered nugatory if the conservatory orders were not granted as there were other markets within the Respondent's locality to which genuine traders had been relocated and were peacefully carrying on their business. It was argued that the traders who had not renewed their licenses were the ones out to cause havoc by insisting that the markets be reopened before their renovation is completed. It was submitted that the court ought to promote environmental governance and ensure a fair balance between competing environmental, social, development and commercial interests.
42. The Respondent contended that it was in the public interest that its Public Health Department be allowed to comply with the statutory notice under section 118 of the *Public Health Act* to ensure the markets do not pose a hazard to traders and members of the public.
43. Arguing that the court ought to apply the proportionality test, the Respondent urged the court to balance the public and private interest bearing in mind any adverse effects that its decision may cause. It was contended that in the circumstances of this case, closing the markets was reasonable and rational in order to address the public health concerns.
44. The court was urged to consider the guiding principles under section 18 of the *Environment and Land Court Act* which provides for the precautionary principle in the exercise of its discretion. The Respondent contended that Article 42 of the *Constitution* provides for the right to a clean and healthy environment and everyone was enjoined to cooperate with state organs to ensure that this right is realized.
45. Finally, on whether the Applicant was entitled to a mandatory injunction, the Respondent submitted that the Applicant had not demonstrated the existence of any special and exceptional circumstances to warrant the grant of a mandatory injunction. Reliance was placed on the cases of *Kenya Breweries Ltd & Another v Wabington Okeyo (supra)* and *Nationa Media Group & 2 Others v John Harun Mwau* [2014] eKLR
46. In view of the fact that the Respondent had alluded to the fact that there was a pending criminal case, CM Criminal case No.1019 of 2022 where the lower court had issued an order closing of the two markets in December which had been extended in January, the court perused the file to confirm how long the said orders were to remain in force. The parties also consented to a visit to Champions and Sixty- Four Markets in the presence of the Deputy Registrar to establish the situation on the ground. The said visit took place on 15th May, 2023 and the Deputy Registrar filed his report together with photographs depicting the state of the markets.



Determination

47. Having considered the application, the submissions by both parties and the report of the Deputy Registrar dated 15th May, 2023 the only issue for determination is whether the orders sought should be granted.
48. Without delving into the merits of the application, what is clear from the report filed by the Deputy Registrar pursuant to the site visit to Champions and Sixty- Four Markets is that in an unfortunate turn of events and contrary to what was deponed in the affidavit of the Respondent's Chief Officer in charge of the Department of Trade and Industrialization that the markets were being renovated, the Respondent has demolished the said markets, ostensibly with a view to constructing a new market in conjunction with the national Government. This was confirmed upon perusal of the proceedings in CMCR case No.1019 of 2022. The court record reveals that when the matter came up for Mention on 29th March, Abraham Mengich the Chief Officer, Trade and Industrialization Uasin Gishu County, who is the accused person informed the court that the Cabinet had decided to develop a new market altogether. He further informed the court that the old market had been demolished and Bills of Quantities had been developed and drawings done. He informed the court that the new market would be constructed in conjunction with the National Government.
49. Subsequently, the case was mentioned on 31st March, 2023 and then on 22nd May, 2023 when the case was withdrawn and the accused was discharged under section 89(5) of the Civil Procedure Code.
50. In the circumstances, it is not feasible to grant the orders sought as the same are incapable of being enforced. It is trite that the Court does not issue orders in vain.
51. Accordingly, the application is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF JUNE 2023.

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J.M ONYANGO

JUDGE.

In the presence of;

1. Mr. Sonkule for Mr. Oduor for the Petitioners/Applicants

2. Miss Kesei for Miss Chesoo for the Respondent

Court Assistant: A. Oniala

