



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**PETITION NO. 9 OF 2015**

**IN THE MATTER OF ARTICLES 1, 2, 10, 22, 28, 40, 47, 55,**

**57 AND 186 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF 4<sup>TH</sup> SCHEDULE PART 2 (7) (A), (B)**

**AND (C) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER**

**ARTICLES 10, 28, 40, 43, 47, 55 AND 57 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE STALLS/LOCK-UPS AT THE UASIN**

**GISHU COUNTY GOVERNMENT WHOLESALE MARKET**

**AND**

**IN THE MATTER OF UNHINDERED ACCESS TO THE MARKET STALLS/**

**LOCK-UPS AT THE UASIN GISHU COUNTY GOVERNMENT WHOLESALE MARKET**

**BETWEEN**

**THE ELDORET MARKET TRADERS ASSOCIATION.....PETITIONER**

**AND**

**THE UASIN GISHU COUNTY GOVERNMENT.....RESPONDENT**

**JUDGMENT**

Eldoret Market Traders Association, (hereinafter referred to as Petitioners) have filed this Petition against the Uasin Gishu County government (hereinafter referred to as the respondent) claiming that the respondent on 25.5.2015 caused a general single notice to be affixed at the entrance of the market intimating that it would carry out massive eviction of the petitioner's members over alleged default of unspecified levies. The petitioners aver that the notice is a nullity, unlawful and unconstitutional for the reasons that the respondent is seeking to evict the petitioner's members without following due process and without a decree of the court thus an improper exercise of the sovereign power of the people of Kenya contrary to Article 1 of the Constitution of Kenya, 2010.

The respondent in giving a general, 7 days and omnibus notice in rem is acting contrary to Article 47 of the Constitution of Kenya, 2010 which guarantees the members of the petitioner the right to lawful, reasonable, procedurally fair and entitlement to be given written reasons since their interests are adversely affected.

The respondent's notice and intended actions of evicting people en-mass militates against Article 10(1), (1)(a), (b), (c) and (d) of the Constitution of Kenya, 2010 since the same is contrary to the rule of law, the objects of devolution, human dignity, social justice human rights, good governance and sustainable development.

The respondent's intended eviction amounts to arbitrary deprivation of property or an interest in it contrary to Article 40 of the Constitution of Kenya, 2010.

The respondent's intended action of evicting the Petitioner's members amounts to an infringement of Articles 55 and 57 of the constitution of Kenya, 2010 as it denies the Petitioner's members an opportunity to associate and participate in the economic spheres of life, pursue personal development, to live in dignity and respect free from abuse.

The respondent's action is contrary to Article 186 of the Constitution of Kenya, 2010 as it does not mandate the respondent to issue such notices or evict any persons without a court decree.

The Petitioner prays for Judgment that a declaration do issue pursuant to Article 2(4) of the Constitution of Kenya, 2010 that the acts and/or omissions of the respondent in issuing the notice dated 25<sup>th</sup> May, 2015, failing to obtain a decree for eviction or pursuing the legally recognized legal channels for debt recovery are a nullity and invalid for failure of compliance with Articles 1, 10, 28, 40, 47, 55, 57 and 186 of the Constitution of Kenya, 2010 and the respondent has no mandate whatsoever to evict the Petitioner's members from the occupation of the Uasin Gishu County Wholesale Market or carry out debt collection without following the law and the Constitution of Kenya, 2010 and that the costs of the petition be awarded to the Petitioner.

The petition is supported by the affidavit of Zakayo Maina Kariuki who states that the petitioner consists of 50 members who carry on business at the Uasin Gishu Wholesale Market dealing in groceries among other products. The members have been paying dues to the respondent. However, on 25.5.2015, the respondent caused a general notice to be affixed at the entrance of the market intimating that it would carry out massive eviction of the petitioner's members. The petitioner avers that the notice is unconstitutional, it contravenes Articles 40, 47, 55 and 57 of the Constitution of Kenya, 2010. The petitioner relies on the decision in Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR, where the Court of Appeal held that the standard guide in Constitutional petitions must remain the command in Article 258 of the Constitution of Kenya, 2010.

The petitioner argue that 7 days' notice was offensive to Article 47 of the Constitution of Kenya that provides for a fair administrative action. The respondent's action of giving notice was an administrative one hence was supposed to comply with Article 47 of the Constitution.

The petitioners contend that the intended massive eviction by respondent awaited the deposition of property contrary to Article 40 of the Constitution.

Moreover, that the petitioners have not demonstrated that their rights were infringed. Moreover, that they are not entitled to damages claimed as the eviction did not take place.

The respondent on his part contends that the petitioners have not disputed the debt and admits to having received the notice of eviction dated 25<sup>th</sup> May 2015. The respondent further contends that the petition does not meet the threshold set out in Anarita Karimi's case.

#### **ANALYSIS AND DETERMINATION**

The genesis of this petition is a Notice to vacate issued on 25.5.2015 by the Directorate of Licensing and Compliance, Uasin Gishu County in the Republic of Kenya. The notice reads:

***“Following the expiry of the NOTICE issued on 12<sup>th</sup> May, 2015 to all stall/lockup owners to clear outstanding arrears owed to the COUNTY GOVERNMENT OF UASIN GISHU in the County's Markets, you are hereby requested to prepare to vacate from the County's Markets within seven (7) days with effect from the date of this NOTICE.***

***Those who still owe the County government of Uasin Gishu money in arrears are warned of massive eviction of defaulters in case of failure to comply with this directive.***

***Name of Stall/lockup owner: MARY MIDEVA***

***Name of the Market: RETAIL/WHOLESALE MARKET***

*Arrears owed to County Government: 87,020*

*Thank you.*

**SIGNED**

**COUNTY DIRECTOR FOR LICENSING**

**25<sup>TH</sup> May, 2015”**

The notice to vacate is addressed to Mary Mideva alone but warns all the stall owners. It refers to an earlier notice of 12.5.2015 which is not annexed to the petition or response by the respondent.

The notice intimates that all stall owners who still owe the County government of Uasin Gishu will be evicted but it does not pin-point the individuals who owe the County government. It does not state how much is owed by the individuals except Mary Mideva.

The Notice is arbitrary as it is not clear as who owes the County Government, the market rents. If enforced, it is likely to deprive innocent stall owners who have paid market rent of their income.

This petition is grounded on Article 47 of the constitution of Kenya 2010 that provides for a fair administrative action. The fact that the right to Fair Administrative Action is a constitutional right was stated by the *Constitutional Court of South Africa* in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1*, that;

***“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”***

The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized as stated in the Court of Appeal case of *Judicial Service Commission v Mbalu Mutava & another* [2014] eKLR; that;

***“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”***

And in the case of *Dry Associates Ltd v Capital Markets Authority and Another*, [2012] eKLR, the Court observed;

***“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”***

Taking the above jurisprudence into account, there is no doubt in my mind, that acting as it did, the respondent violated petitioner’s right to a fair Administrative Action contrary to Article 47 of the Constitution. Administrative Actions that flow from statutes, must now meet the constitutional test of **legality, reasonableness** and **procedural fairness**. It is an important to apply fair administrative action to safeguard against highhandedness and abuse of authority by public bodies exercising administrative and quasi-judicial functions.

I do find that the petitioner has demonstrated that she is an association that is duly registered and whose members are the stall owners at the Eldoret Wholesale Market and therefore the Petitioner has locus standi to bring this action. Moreover, the petitioner has demonstrated that its members are facing a threat of eviction which is arbitrary as the respondent has not specified who is to be evicted but threatens massive eviction and therefore the petition meets the threshold for a constitutional reference. The act of the respondent notifying the petitioners member of the eviction is an administrative action as it emanates from a public body and is likely to affect the rights of the petitioner’s members.

I do grant a declaration that the Notice dated 25.5.2015 is arbitrary, unlawful and contrary to the law for failing to notify the individual members of the petition of the intended eviction and for intimating that all stall owners who had not paid rent would be evicted without naming them personally. Moreover, 7 days’ notice was unreasonable.

There is no evidence of either general damages or special damages suffered by the petitioners and therefore I shall not award the same. I do decline to grant costs as the petitioners have failed to demonstrate that its members are paying rent promptly. Orders accordingly.

**Dated and delivered at Eldoret this 11<sup>th</sup> day of July, 2019.**

**A. OMBWAYO**

**JUDGE**