



**Orokise Sacco Limited & another v Kajiado County Government & another
(Petition 10 of 2020) [2024] KEHC 4182 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
PETITION 10 OF 2020**

SN MUTUKU, J

MARCH 12, 2024

**IN THE MATTER OF ARTICLES 22, 23, 27, 39, 40, 43, 47 AND
THE 4TH SCHEDULE 5 (A) (C) AND (D) OF THE CONSTITUTION**

AND

**IN THE MATTER OF SECTIONS 5, 6, 116, 117 AND 120
OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2015**

AND

**IN THE MATTER OF PARKING FEES FOR PUBLIC SERVICE VEHILCE
AND LACK OF BUS PARKS IN ONGATA RONGAI AND KISERIAN**

BETWEEN

OROKISE SACCO LIMITED 1ST PETITIONER

ONGATA RONGAI BUS SERVICES CO. LTD 2ND PETITIONER

AND

KAJIADO COUNTY GOVERNMENT 1ST RESPONDENT

**THE TRAFFIC POLICE COMMANDANT KAJIADO COUNTY 2ND
RESPONDENT**

JUDGMENT

The Petition

1. The Petitioners have filed this Petition on behalf of their members claiming violation of their rights under *the Constitution* by the Respondents. The Petitioners presented a case that their members operate public service motor vehicles (PSV) duly licensed by the National Transport and Safety Authority (NTSA) which commute daily, carrying passengers between Nairobi Central Business



District in the Nairobi City County to Ongata Rongai and Kiserian towns in Kajiado County where they terminate their trips. By the reason of plying within Kajiado County, the 1st Respondents has since 2014 been charging parking fees of Kshs 1,500 for 14-seater matatus and Kshs 3,000 for buses.

2. The Petitioners stated that after *the Constitution* of Kenya 2010 came into operation, the 1st Respondent took over the functions of county roads, traffic, parking and public transport as provided under the Fourth Schedule paragraph 5 (a) (c) and (d) of *the Constitution* but the 1st Respondent has failed, neglected and/or blatantly refused to construct bus parks at Ongata Rongai and Kiserian townships in Kajiado County forcing the Petitioners and other road and parking users and public service vehicles to stop on the roadside to pick and drop passengers for lack of parking space.
3. The Petitioners stated that the 1st Respondent's circular issued on 6th February 2014 banning dropping and picking of passengers on certain areas in Ongata Rongai and Kiserian towns and lack of bus parks or matatu termini in the two towns have caused petitioners and their customers untold hardship, forcing them to improvise to pick and drop their passengers. This has led to arrests and prosecution of the Petitioners by the Respondents' agents for obstruction, picking and dropping passengers at undesignated areas. The Petitioners have stated that they have petitioned the 1st Respondent on the issue of bus parks and matatu termini and several meetings have been held to address the issue but no action has been taken despite the Petitioners continued payment of parking fees.
4. The Petitioners accuse the 1st Respondent of discriminating against them and contravening Article 27 of *the Constitution* in failing to provide bus parks and matatu termini from them in Ongata Rongai and Kiserian towns when they have constructed modern and spacious bus parks in Ngong and Kitengela towns.
5. The Petitioners accused the Respondents of subjecting them to inhuman and degrading treatment by impounding their motor vehicles and arresting their drivers, employees and servants on a daily basis as a result, the Petitioners have been denied the use of the vehicles and their employees are denied freedom in violation of Articles 39 and 40 of *the Constitution*.
6. The Petitioners claim that they and the residents of Ongata Rongai and Kiserian towns, the operators of PSVs and their employees are being treated unfairly by the Respondents in violation of Article 47 of *the Constitution* and that the consumers of public transport services rights of having bus park services of reasonable quality and to gaining full benefit from services rendered by the 1st Respondent violated and infringed upon in contravention of Article 46 of *the Constitution*.
7. The Petitioners claim that their aspirations of economic and social emancipation and empowerment is threatened in violation of Article 43 of *the Constitution* and that the rights of their members have been, are being and are likely to continue being violated and that this will not abate unless and until this Honourable Court compels the Respondents to perform its functions or unless they are prohibited from benefitting from the Petitioners without rendering any services.
8. The Petitioners seek the following reliefs:
 - a. An order be issued by this Honourable Court to suspend the payment of the bus park fees for Ongata Rongai and Kiserian bus park as indicated in the Kajiado County Finance Act No. 1 of 2014 until the Respondent constructs bus parks in Ongata Rongai and Kiserian towns.
 - b. An order of probation be granted to prohibit the Respondents from impounding the Petitioners' PSVs, arresting the Petitioners' drivers and conductors when they drop and pick passengers on the roadside within the Ongata Rongai and Kiserian towns until the 1st



Respondent provides or allocates sufficient space and ground for the dropping and picking passengers.

- c. A declaration that the collection of the bus park fees for Ongata Rongai and Kiserian bus parks as indicated in the Kajiado County Finance Act No. 1 of 2014 without providing bus parks and impounding of the Petitioners' PSVs, arresting and charging members of the Petitioners, their employees, drivers, conductors and or servants is unconstitutional as it offends provisions of Articles 40, 47, 43, 39 and 27 of *the Constitution*.
 - d. A declaration that the failure by the 1st Respondent to provide bus park services at Ongata Rongai and Kiserian is an abdication of their responsibility pursuant of Article 186 (1) and the Fourth Schedule Paragraphs 5 (a) (c) and (d) of *the Constitution* of Kenya.
 - e. An order of Mandamus be granted to compel the 1st Respondent to allocate land, construct and provide the Petitioners and the members of the public with bus parks in Ongata Rongai and Kiserian towns.
 - f. An order be granted directing the 1st Respondent to gazette designated bus parks and/or bus stage for PSVs in Ongata Rongai and Kiserian township within Kajiado County.
 - g. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.
 - h. The Respondents do pay the costs of this Petition.
9. The Petition is supported by an Affidavit sworn by Joseph Gatheca Kamau, the Chairperson of the 1st Petitioner on 25th August 2020. The Supporting Affidavit reiterates the contents of the Petition and attaches copies of the following documents:
- i. Copy of the 1st Petitioner's Certificate of Incorporation.
 - ii. Copy of the 9th Schedule of the Kajiado County Finance Act No. 1 of 2014.
 - iii. Copy of the Fleet List and copies of Road Service Licences.
 - iv. Copies of photographs of the Kiserian stage and Ongata Rongai stage.
 - v. Copy of the Circular issued by the 1st Respondent on 6th February 2014.
 - vi. Copies of charge sheets and receipts of cash bail payments.
 - vii. Copy of correspondence between Petitioners and 1st Respondent.
 - viii. Copies of bus park fees the payment receipts.
 - ix. Copies of photographs of Ngong and Kitengela Bus Parks.
 - x. Copy of the picture of Petitioners' clamped motor vehicle.

The Reply to the Petition

10. The 1st Respondent entered appearance on 29th September 2020 but did not file a Replying Affidavit. There are, however, two affidavits from the 1st Respondent, the 1st Replying Affidavit was sworn on 26th October 2020 by Jonathan Saigilu, the 1st Respondent's Supervisor Revenue in Reply to the Petitioners' Application dated 25th August 2020. The second Replying Affidavit is sworn by Parsakei Orumoi, Director Revenue on 26th October 2020 in Reply to the same application dated 25th August 2020.



11. On 16th March 2022, counsel for the 1st Respondent informed the court that the 1st Respondent would be relying on the two affidavits in Reply to the Petition. The contents of the two affidavits are similar and from them this court can discern the case for the Respondents.
12. It is the case for the 1st Respondent that this suit was filed because of the impounding and detaining of motor vehicles registration numbers KCA 134W, KCJ 140X, KCJ 320Y and KBE 002E belonging to the Petitioners on 8th September 2019 at Ongata Rongai Police Station for failure to pay parking fees as shown on the attached copies of the charge sheets. That the Petitioners are not the only Saccos operating within Ongata Rongai and Kiserian but there are other six Saccos on that route who have been complying with the requirements to pay parking fees and whose drivers and vehicles get arrested and impounded respectively when they fail to pay parking fees.
13. The 1st Respondents stated that the Petitioners have been paying parking fees for all the time in compliance with the Kajiado County Finance Act. The 1st Respondent stated that it has not failed, neglected or refused to construct bus parks in Ongata Rongai and Kiserian towns but plans to construct bus parks in the two towns are on course and are currently being considered in terms of funding, location and planning because it is not possible to construct all the four bus parks simultaneously.
14. It is the case for the 1st Respondent that the circular mentioned by the Petitioners not to pick or drop passengers on certain areas in Ongata Rongai and Kiserian towns has already lapsed, and the said areas are now used as bus stops and no vehicle belonging to the Petitioners has been arrested by the 2nd Respondent for doing so after the circular lapsed. That the agents of the respondents only arrest the Petitioners' drivers and conductors for breaking the law by overtaking, picking or dropping passengers at undesignated areas. That no drivers or conductors have been arrested for stopping, picking or dropping passengers at designated areas as alleged by the Petitioners. That there are five (5) designated stages along Magadi Road between Ongata Rongai and Kiserian towns at Kware, Tusky's, Maasai Mall, Maasai Lodge and Tumaini.
15. The 1st Respondents has stated that the Petitioners and other stakeholders have on several occasions been invited to consultative meetings to discuss the issue of construction of bus parks and are therefore aware of the issue of construction of bus parks is ongoing but has delayed due to infrastructure challenges and planning of Ongata Rongai and Kiserian in that the two towns do not allow construction of large bus parks and bus stages without relocating the residents which is an added expense. That this Petition is unnecessary because the Petitioners are aware that the construction of the bus park and bus stages is work in progress but brought this Petition to evade paying parking fees.
16. The 1st Respondent has stated that no rights of the Petitioners are being violated and that if the court allows the Petition, it will be tantamount to setting a precedent that will allow the taxpayers to refuse to pay certain taxes on grounds that they have not yet been issued with certain services.

Submissions

17. The Petition was canvassed by way of written submissions. The Petitioners have filed their submissions. The Respondents have not. The unpaginated submissions by the Petitioners are dated 17th April 2023. They have submitted that Article 27 of *the Constitution* provides that every person is equal before the law and that by failing to afford the Petitioners bus parks in Ongata Rongai and Kiserian, the 1st Respondent is discriminating against the Petitioners and that there is no equal treatment before the law and equality in provision of services and therefore the 1st Respondent is infringing the rights of the Petitioners as provided under Article 27.



18. The Petitioners relied on John Mbugua & 2 others (suing as officials of the Internally Displaced Persons Association) v Attorney General [2017] eKLR where the court held that:

“ Article 27 of *the Constitution* guarantees to all persons the right to equality and freedom from discrimination. All persons are created equal and none should receive preferential treatment. Discrimination is the preferential treatment accorded to persons in comparable positions on one or more of the grounds prohibited by *the Constitution* or on the basis of an unreasonable distinction and without any lawful justification.....”

19. They submitted that the 1st Respondent is treating the Petitioners differently from the people of the other parts of Kajiado County, yet they also pay the same parking fees and relied on Peter K. Waweru v Republic (2006) eKLR to emphasize on the issue of discrimination where the Court, in considering the non-discrimination provisions in the repealed constitution observed that:

“Under Section 82 (3) of *the Constitution* of Kenya, ‘discriminatory’ means ‘affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connections, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.’”

20. The Petitioners submitted that their rights under Article 47 of *the Constitution* have been violated by the Respondents by treating the Petitioners and the people of Ongata Rongai and Kiserian towns unfairly through their administrative failings, neglect and or acts of maladministration. They submitted that the 1st Respondent has failed to provide public amenities (bus parks) in Ongata Rongai and Kiserian towns and when the Petitioners protest and demand services, they are unfairly treated by having their motor vehicles impounded and their employees arrested in contravention of Article 47. They relied on Judicial Service Commission v Hon Mr. Justice Mbalu Mutave & another [2015] eKLR where the Court held 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 1- 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.”

21. They have submitted that by virtue of being residents of Kajiado County and consumers of the services provided by the 1st Respondent, Article 46 of *the Constitution* protects them and ensures that they have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services and to the protection of their health, safety and economic interests and therefore by failing to provide bus parks, the 1st Respondent has violated the rights of the Petitioners under this article.



22. They have submitted that by impounding their vehicles and arresting their drivers, yet they have not provided services for the Petitioners, the 1st Respondent has violated Articles 39 and 40 of *the Constitution* by subjecting the Petitioners' drivers and conductors to inhuman and degrading treatment and denying them the use of the vehicles.
23. In support of the prayer for Mandamus, the Petitioners have submitted that the scope of the remedy of Mandamus was exhaustively set out in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji & 9 others* [1997] eKLR where the Court stated as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:- “The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

24. The Petitioners also relied on *Kingdom Kenya 01 Limited- v District Land Registrar Narok & 15 others* [2018] eKLR where the court stated that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought. They submitted that the 1st Respondent has a role to play in ensuring that while the law allows and mandates them to collect fees and levies, they are also mandated to provide public amenities and services to the public. That the 1st Respondent has failed to comply with the law and therefore the orders sought ought to be issued.

Analysis and Determination

25. I have read and understood the Petition and the Response by the 1st Respondent. To my mind, this Petition raises two major issues for determination: whether the Petitioners have met the threshold in constitutional petitions and whether the Petitioners are entitled to the reliefs sought.

Whether the Petitioners have met the threshold in constitutional petitions

26. The law places the burden on the Petitioners to prove their case on a balance of probabilities. The standard to be met was laid out in *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272. It is trite that a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. In *Anarita Karimi* case, it was stated that:

“Constitutional violations must be pleaded with a reasonable degree of precision.”

27. The same principle was enunciated in *Mumo Matemvu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Court stated as follows:

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this



principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

28. The Petitioners have anchored their Petition on Articles 22, 23, 27, 39, 40, 43, and 47. Article 46 is also mentioned in the Pleadings as having been violated. Article 22 provides every person, whether in his own capacity or on representative capacity, with the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23 provides the authority of the court to uphold and enforce the Bill of Rights.
29. The Petitioners rely on Article 27 is about equality and freedom from discrimination. It provides under Article 27(1) that “Every person is equal before the law and has the right to equal protection and equal benefit of the law.” They claimed that they have been discriminated against by the 1st Respondent for failure to construct bus parks in Ongata Rongai and Kiserian towns while the 1st Respondent has provided these facilities to the PSVs in Kitengela and Ngong despite the fact that they pay parking fees. The 1st Respondent has explained that the construction of bus parks in Ongata Rongai and Kiserian towns is work in progress, a fact which they state is well known to the Petitioners who have been participating in stakeholder engagement meetings called by the 1st Respondent.
30. The 1st Respondent has explained that the construction of bus parks in Ongata Rongai and Kiserian has faced challenges due to lack of space in the two towns. It has also been explained that there is planning, financing and other challenges to be dealt with first before these bus parks can be provided, and that these works have to be staggered in order to plan and provide financing.
31. Article 39 provides for the freedom of movement and residence while Article 40 provides for protection of right to property. The Petitioners have claimed that their rights under the two articles named above have been violated. They refer to impounding and retaining of their vehicles and arrest and charging of the drivers and conductors as the reasons for this claim.
32. On this issue, the 1st Respondent has provided evidence that the impounding and retaining of Petitioners vehicles was due to non-payment of parking fees as shown in the annexures to the 1st Respondent’s affidavit and that the arresting and charging of the drivers and conductors of the Petitioners was due to violation of traffic law. It was further stated that the circular prohibiting picking and dropping of passengers in the areas of Ongata Rongai and Kiserian towns mentioned by the



Petitioners is no longer in force and that there are designated parking areas between the two towns in Kware, Tusky, Maasai Mall, Maasai Lodge and Tumaini.

33. The Petitioners claim that their consumer rights to goods and services of reasonable quality and to the information necessary for them to gain full benefit from goods and services provided under Article 46 have been violated and that their right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, as provided under Article 47, has been infringed by the 1st Respondent.
34. In respect to consumer rights to goods and services of reasonable quality as well as information, I have considered the case for the Petitioners and the explanation offered by the 1st Respondent. While I agree with the Petitioners that every person in this country is entitled to the rights provided under Article 46, it is my view that the 1st Respondent has offered reasonable explanation to show that there is good will and plans to provide for the services for the benefit of the Petitioners and public at large in the two towns.
35. Further, while I agree with the Petitioners that their right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, as provided under Article 47 is guaranteed, I have noted that there is explanation that the provisions of the services sought by the Petitioners is work in progress.
36. After the above analysis, it is my considered view that the Petitioners have not met the threshold of constitutional petitions. They have not demonstrated that the 1st Respondents, or the 2nd Respondent violated their rights. The reason for arriving at this conclusion is that the 1st Respondent has given plausible explanations to counter the case for the Petitioners. I am satisfied with the explanations offered that construction of a bus park in Ongata Rongai and Kiserian is in the plans and that the 1st Respondent has been engaging stakeholders including the Petitioners on this issue.
37. I have no evidence to controvert the explanation by the 1st Respondent on its evidence on the issues being raised by the Petitioners. In respect of the 2nd Respondent, other than arresting and charging those that break traffic rules, there is no evidence to prove any other role he played. With the explanation offered by the 1st Respondent, this court is satisfied that the 2nd Respondent was acting within his mandate in the belief that those arrested, or those whose vehicles were impounded, have breached the law.

Whether the Petitioners are entitled to the reliefs sought

38. Without belabouring the point, where a party fails to prove its case, then it follows that the party is not entitled to reliefs sought. On the first relief sought, (a) it is my understanding that the parking fees charged are based on the Kajiado County Finance Act, which is passed every year. To grant this relief would in my view be akin to declaring the part of the Act dealing with payment of these fees and levies invalid without pleading or seeking such orders.
39. In respect to relief (b), the impounding, arresting and charging of the drivers and conductors has been explained. The law must be followed and anyone who breaches the law must face it. I have no evidence showing that any vehicle or any person was arrested after complying with the law. It has been explained that those arrested, or the vehicles impounded and detained had breached the law.
40. In respect to prayer (c) the Petitioners will have to be a little bit patient to allow the 1st Respondent time to plan, finance and execute the plans of providing the services required. I agree with the Petitioners that it is a legitimate expectation of the taxpayers, or the people paying for fees and levies that services



will be provided for them and this ought to be honoured by the service providers, in this case the 1st Respondent.

41. In respect to prayer (d) it is my view that the 1st Respondent, given the explanation offered in this Petition, has not abdicated its duty and responsibility pursuant to Article 186 (1) Paragraph 5(a) (c) and (d) of *the Constitution* and that the services sought will be provided in due time.
42. In respect of prayer (e), an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed (see Kenya National Examination Council case cited above). I reiterate that I am satisfied with the evidence of the 1st Respondent explaining why the bus parks in Ongata Rongai and Kiserian have not been constructed. The same reasoning applies to prayer (f).
43. Consequently, the Petitioners have not met the threshold of constitutional petition. They have not proved their case to the required standard and therefore the prayers they seek cannot be granted. The consequence of this is that the Petition fails and must be dismissed. Given the nature of the petition I direct that each party bears own costs of this litigation.
44. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2024.

S. N. MUTUKU

JUDGE

