



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 57 OF 2016

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 28, 47, 50 AND 53 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 28, 43 AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MUSA BANDARI.....1ST PETITIONER

MOHAMED NURU MWAMBA.....2ND PETITIONER

OMARI BAKARI SUYA.....3RD PETITIONER

VERSUS

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

KENYA MARITIME AUTHORITY.....4TH RESPONDENT

JUDGMENT

1. By an amended petition filed herein on 15/5/2017, the Petitioners pray for the following orders:

a. A declaration that the Petitioner's right under Article 28, 47, and 43 of the Constitution of Kenya, 2010 have been violated by the Respondent.

b. An order against the Respondents to compensate the Petitioners for their loss of livelihood immediately.

c. An order of Mandamus directed at the Respondents to compensate the petitioners for their loss of livelihood immediately.

Petitioners' Case

2. The suit arises from the Government sponsored protect the Standard Gauge Railway (*herein the SGR*). The Government resolved to construct a berth and a marshaling yard for the SGR at Kwa Skwembo (Port Reitz) in Mombasa. The construction necessitated the relocation of the fisher folks because the new SGR facilities diminished/or extinguished fishing activities in the area.

3. The Petitioners invoke the constitutional jurisdiction of this court through this petition claiming that they were licensed fishermen who have been denied the use of the Mtongwe Landing Site and are effectively rendered jobless for which they seek compensation.

4. The Petitioners state that they were duly licensed and registered fishermen with the Ministry of Fisheries to carry out fishing activities from Mtongwe Landing Site, which was their only access to the sea and where they kept, serviced and operated their boats, nets, and other fishing equipment.

5. The Petitioners state that the Government through the Respondent sought to implement the Standard Gauge Railway Project at Mtongwe Landing Site rendering them jobless. However, prior to the commencement of the implementation of the SGR project, the Respondent had promised to compensate them for loss of their livelihood after a conduct of a verification exercise to identify genuine affected persons was finalized. However, the Respondents have violated their right to a fair administrative action, their right to be protected from inhuman treatment by condemning them unheard, and without following the proper procedure by leaving them out of the compensation.

The Response

6. The petition is opposed by all the Respondents. The 1st Respondent filed a Replying Affidavit sworn by **David Njogu** on 10/3/2019, while the 2nd Respondent filed a Replying Affidavit sworn by **Simon Losepicho** on 20/6/2017.

7. The 3rd and 4th Respondents did not actively participate in the petition.

8. The 1st and 2nd Respondents' case is that the verification exercise to establish the genuine affected persons and compensation process was undertaken in 2016. They aver that the Petitioners were neither members of the Mtongwe Beach Unit, or licensed to fish at the site.

9. The Respondents aver that at all times, all fishing activities were governed by the Fisheries Act (now repealed) and the Fisheries (Beach Management Unit) Regulations 2007, and that any person conducting fishing activities along the coastline of Mombasa must be a registered member of a Beach Management Unit and licensed before taking any fishing activities as a form of livelihood. The said licenses are issued to persons who are recognized as members of BMUs and the said licenses are renewable annually. The BMUs have their own register their members, which include a Chairman, Secretary and Treasurer.

The Hearing

10. The petition was heard *viva voce*. The 1st Petitioner testified on his own behalf and on behalf of the other Petitioners. He testified that they were members of the BMU. However, the Technical Committee, which was formed to verify the true fishermen, colluded with the Petitioners' Chairman Mwadzame Mwachipuli and his committee, and manipulated the exercise of identifying registered members of the BMU by leaving genuine fishermen and bringing in their cronies.

11. The 1st Petitioner testified and stated that their Chairman refused to renew membership of genuine fishermen, and embarked on registering new members who were not fishermen but heir cronies. Further, the Chairman refused and/or ignored calling a meeting of all genuine fishermen for the purposes of identifying the genuine and/or bona fide members of Mtongwe BMU.

12. The 1st Petitioner testified that the membership of BMU was permanent. However, it was the license, which was annual, but the identification of members was based on membership and not on the licence, which the 2nd Respondent refused to issue to fishermen claiming that fishermen were to cease fishing due to the SGR project.

13. The 1st Petitioner testified that in the list of beneficiaries, 13 individuals who were not fishermen or stakeholders were illegally and/or wrongly included. Further, the said list is incomplete as some pages are deliberately missing as the same may contain names of relatives of the official of the Mtongwe BMU, which names the Petitioners have disclosed and the list provided to court has only 97 names instead of 132 names.

14. On their part, the 1st Respondent called one witness **Justine Omoke** (DW1). He adopted his witness statement, and denied the allegations

contained in the petition. DW 1 confirmed that the 2nd Respondent is responsible for licensing the BMU members and that it was the 2nd Respondent's duty to identify genuine fishermen affected by the project and to ensure that they were compensated. The witness confirmed that all affected persons were compensated, and the duty of the 1st Respondent ended.

Submissions

15. **Mr. Aboubakar**, learned counsel for the Petitioners submitted that the Petitioners' had discharged their burden of proof by proving that they were fishermen duly registered with the Ministry of Fisheries and Development; that they were duly licensed to carry out fishing activities, and their evidence was subject to cross-examination regarding the truthfulness of the content of their documents. Reliance was placed on Section 5, 35, 65, 66, 107, 108 and 109 of the Evidence Act.

16. Counsel further submitted that the 2nd Respondent was in charge of compensation. However, it has failed to disclose the names of the chairperson of the Mtongwe BMU, and a list of members of the Mtongwe BMU it issued licenses to and copies thereof. Counsel cited **Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** where it was held that a deponent who gives a witness statement and stays away from the proceedings thereby avoiding cross-examination robs his witness statement

of any probative value.

17. **Mr. Aboubakar** further submitted that the 2nd Respondent violated the Petitioners' rights guaranteed under Article 47 of the constitution by failing to give them written reasons for failing to consider them for compensation, denying them an opportunity to be heard and to make representation, and an opportunity to attend the meeting intended at identifying the bona fide members of the BMU.

18. **Mr. Sitonik** learned counsel for the 1st Respondent submitted that the Petitioners did not adduce credible and admissible evidence to prove their claim, as they did to prove that the 2nd Respondent licensed them; that they were registered members of a BMU; or that their livelihood was affected by the SGR project. Counsel further submitted that the Petitioners did not produce any licence that was valid at the time the verification of those affected by the project was being conducted.

19. **Mr. Sitonik** further submitted that the Petitioners despite conceding that the BMU keeps a register of its members, they neither availed a copy of the said register to this court nor attempted to exercise the option of calling for production of the register by exercising their right under Section 4 of the Access to Information Act. Counsel submitted that the 1st Petitioner's licence was issued on 26/6/2006 and there was no evidence of its renewal and the 1st Petitioner also confirmed that his BMU membership expired on the 25/8/2013, and as a result he was not entitled to compensation as verification was done in the year 2016.

20. In order to displace the inference by the Petitioners that their application for renewal of their licenses was rejected, **Mr. Sitonik** submitted that no evidence was produced to show either that indeed the Petitioners had applied for licenses, or that their applications were rejected and that they appealed to the director. Counsel cited Regulation No. 29 of the Fisheries (General) Regulation, which requires applications for licenses to be in writing and in a special format. Further, that a person denied issuance or renewal of a licence has a right of appeal to the director within 30 days of refusal.

21. On the issue of alleged violation of the Petitioners' rights guaranteed under Article 28, 43 and 47 of the constitution, Counsel submitted that the leadership of BMU's and stakeholders were involved in the identification of genuine persons affected by the SGR project, and the Respondents adduced evidence to show that consultative meetings resulted into compensation of genuine affected persons through the 2nd Respondent.

22. **Ms. Kisingo** learned counsel for the 2nd Respondent submitted that the Petitioners alleged breach of their constitutional rights. However, they never stated the manner in which their rights were violated. Counsel further submitted that a person could only conduct fishing activities in Kenya if they possessed a valid licence as provided under Section 8 (1) of the Fisheries Act Cap 378 Laws of Kenya, and the said licence is renewable annually as provided under Section 10 (10) of the Fisheries Act, and under Section 11 (7) of the Beach Management Regulation of 2017, which provides that it is mandatory for a person to be a member of a relevant BMU before being issued with a licence.

23. Counsel further submitted that the Petitioners have failed to demonstrate how the Respondents have refused to perform their statutory duties, as it is trite law that a person seeking orders of mandamus ought to prove to the court that the Respondent is under a statutory duty to perform the same. Counsel cited **Republic v Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 others [2017] eKLR** where the said position was affirmed.

24. **Mr. Kibet** learned counsel for the 4th Respondent submitted that the 1st Petitioner purports to represent almost 68 Petitioners who have not been included as parties in the petition and have not signed any authority to enable the three Petitioners to act on their behalf. For this reason, counsel submitted that the petition is defective and should be dismissed.

Determination

25. I have considered the petition, Replying Affidavits to the petition, written witness statements, list of documents and submissions. I raise the following issues for determination.

1. *Whether the Petition discloses any cause of action*
2. *Whether the petitioners have discharged their burden of proof.*
3. *What remedies are available to the Petitioners, if any?*

1. Whether the Petition Discloses Any Cause of Action

26. The duty of a Petitioner in a constitutional petition is to disclose, with reasonable precision, the right that he or she alleges to have been infringed, and the manner in which this right has been infringed. This duty, which was first stated by the Court of Appeal in **Anarita Karimi Njeru v. The Republic [1976-1980] KLR 1272**, was restated by the same court in **Trusted Society of Human Rights Alliance v AG. & 2 Others [2012] eKLR**. The Judges said -

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a

person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions, which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

27. From the foregoing authority, the material before the court should be sufficient to enable the Respondent understand and respond to the claim against it and the court is able to formulate the issues raised in the Petition. It is clear from the Petition that the crux of the Petitioners' claim is that their right to a fair administrative action under Article 47 of the Constitution has been infringed. They allege that the Respondents have in collusion with the chairperson of Mtongwe BMU denied them compensation for their loss of livelihood following an SGR project implemented by the government through the 1st Respondent. Consequently, this court finds that the petition meets the threshold laid out in the *Trusted Society of Human Rights Alliance (supra)*.

2. Whether the Petitioners have discharged the burden of proof.

28. Mativo J in the case of *A M v Premier Academy [2017] eKLR* stated the following:

“In my view the petitioner has failed to discharge the burden of prove to the required standard. To my mind, the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds {1955} 1 WLR 948 at 955

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case.”

29. Similarly, a three-judge bench in *Dock Workers Union & 2 others v Attorney General & 2 others; Kenya Ports Authority & 4 others (Interested Parties) [2019] eKLR* stated that -

“...The Petitioners would want this Court to believe that the MOU infringes upon the Constitutional rights of the persons they represent. The burden of proving the allegations lay squarely upon the Petitioners.”

30. In the foregoing context, it is clear 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 that their right to a fair administrative action was infringed. The 1st and 3rd Petitioners have made many allegations. They have also brought little evidence to substantiate the allegations.

31. The Petitioners in their Affidavit in response to the 2nd Respondent's Replying Affidavit admit the contents of paragraph 1-11 of the 2nd Respondents Affidavit. This means that it is common ground that the Respondents carried out a sensitization programme in collaboration with the Chairpersons of BMU's, with a view of enlightening individuals who depend on fisheries and fishing for their livelihood, of the potential effect of the SGR project in the year 2015, and for the purposes of identifying bona fide members of BMU's for compensation for loss of livelihood.

32. From the foregoing, I find and hold that for a Petitioner to benefit from the compensation for loss of livelihood because of the SGR project, the Petitioner needed to prove that he/she was a fisherman in possession of valid licenses from the 2nd Respondent issued for the year 2015, since the sensitization and verification of persons affected by the project began in 2015. Further, I hold that being issued with a licence by the 2nd Respondent in the year 2015 was adequate proof of a person's BMU membership since it is uncontroverted that for the 2nd Respondent to issue a licence to a fisherman, proof had to be given that the person applying for a licence is a member of a BMU who has his or her annual membership in the said BMU paid up.

Was the burden discharged?

33. The Petitioners have stated that they are registered fishermen with the ministry of Fisheries Development and have been duly licensed to carry out fishing activities from Mtongwe landing site as their only access to the sea. In support of this allegations, the 1st Petitioner has produced a fisherman's licence issued in the year 2006 and on the same licence, it is indicated that the licence expires on the 31/12/2006. On the part of the 2nd Petitioner a licence from the 2nd Respondent issued on the 17/9/2015 and expiring on the 31/12/2015 was produced and on the said certificate it was indicated that he was a member of Mtongwe BMU. On the part of the 3rd Respondent a licence from the 2nd Respondent issued on the 8/9/2011 and expiring on the 31/12/2011 was produced and on the said certificate it was indicated that he was a member of Mtongwe BMU.

34. From the foregoing it is the finding hereof that the 1st and 3rd Petitioners together with all other Petitioners they purport to represent have failed to prove that they were fishermen who were registered as members of Mtongwe BMU just before the sensitization of the SGR project began which was in the year 2015, and/or that they have been issued with licenses, from the 2nd Respondent in the year 2015. In fact, the 1st Petitioner in his testimony admitted that his Mtongwe BMU membership expired on the 25/8/2013. Therefore, I find and hold that the 1st and 3rd Petitioners together with the 68 persons they purport to represent, have failed to provide any evidence showing that their livelihoods were affected as a result of the implementation of the SGR project. Consequently, they were not entitled to compensation for any alleged loss of livelihood.

35. For the 2nd Petitioner, however, I am satisfied that the 2nd Petitioner has proved his petition on a balance of probabilities that he was a paid up member of the Mtongwe BMU as at 31/1/2015. The 2nd Respondent had issued the 2nd Petitioner with a licence to carry out fishing activities. The said licence could only be issued once the 2nd Respondent confirmed that a person was a paid up member of a BMU.

36. Looking at the verified list of the Mtongwe BMU members that were compensated produced by PW1 as exhibit “**Rexh.2**”, I note that the chairperson’s licence was issued the same year as that of the 2nd Petitioner and those of other members of the Mtongwe BMU, yet the people on that list were compensated except the 2nd Petitioner. Further, I note that one **Omary Hamisi Rashid** a holder of I.D No. 30927710 was in the verified list of BMU members yet he was holding a licence issued on the 20/4/2014 as evidenced on the verified list and no explanation has been proffered by the 2nd Respondent on the said anomaly.

37. Be that as it may, I find that the moment the 2nd Petitioner proved that he had been issued with a licence by the 2nd Respondent and that he was a member of the Mtongwe BMU, the burden of proof shifted to the 1st and 2nd Respondents who were required to furnish this court with reasons as to why the 2nd Petitioner was left out of compensation, and whether he was given the reasons as to why he did not qualify for the compensation. I find that the 1st and 2nd Respondents never discharged that burden that was shifted to them.

3. What remedies are available to the Petitioners?

38. Having found that the 2nd Petitioner was entitled to compensation as a result of the SGR project, I find and hold the 1st and 2nd Respondents were required under Article 47 of the Constitution to give the 1st and 3rd Petitioners reasons as to why they were not considered for compensation as a result of the SGR project because this court has established that one **Omary Hamisi Rashid** who did not possess a valid licence in the year 2015 was also compensated. Therefore, I am persuaded with the submission by the Petitioners that the 2nd Respondent in collusion with the Chairperson of the Mtongwe BMU deliberately manipulated the exercise of identifying the registered members of the BMU for compensation and left out genuine fishermen. In the end, I find that the 1st and 2nd Respondents violated the Petitioners right to a fair administrative action under Article 47 of the Constitution as no reasons were given to them for the refusal to compensate them.

39. It is the finding hereof that the 1st, 2nd and 3rd Petitioners have proved the Petition on a balance of probabilities.

40. However, this Court is unable to make Judgment in favour of the persons whose names and ID numbers the Petitioners have annexed as members of this petition because there are no supporting documents on how they were affected by the aforesaid SGR project.

41. In the upshot, Judgment is entered as follows:-

a) A declaration is hereby issued that the 1st and 2nd Respondents have violated the rights of the 1st, 2nd and 3rd Petitioners under Article 47(1) to administrative action that is efficient, lawful reasonable and procedurally fair.

b) A declaration is hereby issued that the Respondent has violated the rights of the 1st, 2nd and 3rd Petitioners under Article 47(2) which require the Petitioners to be notified in writing of any adverse actions against him.

c) An order of Mandamus is hereby issued directing and compelling the 1st and 2nd Respondents to compensate the 1st, 2nd and 3rd Petitioners for their loss of livelihood as a result of the aforesaid SGR project.

42. Costs shall be for the Petitioners to be paid by 1st and 2nd Respondents.

Dated, Signed and Delivered at Mombasa this 15th day of October, 2020

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Sitonic for Respondents

No appearance for the Petitioners

