



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL & HUMANITARIAN

PETITION NO. 17 OF 2019

MIKAEL MIYAWA OBUL.....1ST PETITIONER

DOUGLAS HENRY OTIATO.....2ND PETITIONER

THOMAS OCHANDO OBONDO.....3RD PETITIONER

DAVID OTIENO ODWORI.....4TH PETITIONER

DALMAS OGADA JUMA.....5TH PETITIONER

VERSUS

KENYA INFORMAL SETTLEMENTS

IMPROVEMENT PROJECT.....1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU..... 2ND RESPONDENT

THE CHAIRMAN NATIONAL LAND COMMISSION....3RD RESPONDENT

DIRECTOR OF SURVEYS OF KENYA.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. The Petition before me seeks the following reliefs;

(a) A declaration that the actions of commencing work of developing the KOPERE MARKET, DARAJA MBILI TOWNSHIP without involving the Community members, the Petitioners, the stakeholders and other relevant bodies violates the sovereign principle of the Constitution of Kenya 2010, the Land Act 2010, the Natural Land Commission and the County Government Act, and the same is illegal, null and void.

(b) The declaration that the action of the Respondents of overlooking, ignoring, not involving, proceeding to, undertaking and in particular altering the original plan and map of KOPERE MARKET, DARAJA MBILI TOWNSHIP, without their express consent, notice, knowledge, participation, authority of the Petitioners amounted to an illegal usurpation of the rights of the Petitioners as protected under the Constitution of Kenya, 2010.

(c) *Exemplary Damages.*

(d) *Costs and Interest.*

(e) *Any other order as the court may deem fit.”*

2. When the Petition was lodged in court, the Petitioners also lodged an application, under a Certificate of Urgency.
3. The said application was seeking Conservatory Orders, barring the Respondents from continuing with the construction or the implementation of the Kenya Informal Settlements Improvement Project, which was being undertaken at Kopere Market, Daraja Mbili Township.
4. As the Petition and the Application were lodged in court at a time when the High Court was on recess, the Application was first handled by Hon. Lady Justice R.E. Aburili, who was the Duty-Court at the material time.
5. On 30th August 2018 the learned Judge delivered a Ruling through which the court declined to grant a Conservatory Order.
6. When rendering her Ruling the learned Judge expressed herself thus;

“This Court observes that the impugned project, being undertaken by the Respondents has been ongoing for some time, as submitted by Mr. Mirembe, and there is no denial that it is a World Bank Project which is near completion.”

7. The Petitioners are residents of Kopere Market, Daraja Mbili Township.
8. They indicated that the project in issue was intended to develop, improve and/or give a facelift the Kopere Market.
9. However, the Petitioners’ main complaint is that the Respondents, who were implementing the project, had done so without holding any consultations with the community.
10. In a nutshell, the Petitioners submitted that there had been no public participation on the issue at hand.
11. On the other hand, the Respondents submitted that there had been public participation.
12. The Petitioners’ submission was a slight modification from the original assertion, that there had been no consultation, to an assertion that the consultation was neither reasonable nor adequate.
13. The Respondents had made available to the court, Minutes of a meeting held on 7th July 2017; the meeting is dubbed;

“Community Entry Meeting (Baraza).”

14. Attached to the Minutes are copies of Attendance Sheets, reflecting an attendance of 129 persons.
15. The Attendance Registers have names; the institution to which each person is attached to (if any); phone numbers and signatures.
16. In the face of that tangible evidence, the Petitioners submitted that the signatures were forged, or that some of those listed had since passed away, or that the list was doctored.
17. This court wishes to state categorically that submissions do not constitute evidence.
18. Therefore, as the Petitioners did not provide any evidence to show which persons were deceased, or whose signatures were forged or even how the lists were doctored, I find that the Petitioners failed to provide any legal foundation for their contention that the Attendance Registers were not authentic.
19. There is absolutely no proof of the Petitioners’ assertion that those who were consulted were simply hawkers.
20. As the persons whose names are on the lists had provided their particulars, it should have been easy for the Petitioners to specify those who were not residents of Kopere Market.

21. Also attached to the Replying Affidavit of **TOM MBOYA OGOLLAH**, the Kisumu County Co-ordinator, are;

(a) Attendance Sheets for the Progress Review Meeting;

(b) Attendance Sheets for the Plan Validation Meeting – Kopere;

(c) List of Residents who signed a Petition to support the Project; and

(d) Minutes of the Shauri Moyo Settlement Committee Taskforce, which addressed grievances raised by residents.

22. In the face of the Replying Affidavit and the annexures thereto, the 5th Petitioner swore a Further Affidavit.

23. It is very telling that the Further Affidavit did not controvert the matters of fact contained in the annexures to the Replying Affidavit.

24. Having given due consideration to all the evidence placed before me, I find that there was public participation.

25. I further find that the persons who took part in the said

consultations were a reasonable representation of the community.

26. It has been clearly shown that when members of the community raised concerns, their concerns (including grievances) were duly addressed.

27. In the case of **LUO COUNCIL OF ELDERS & 8 OTHERS Vs COUNTY GOVERNMENT OF BOMET [2018] eKLR**, a three-Judge bench of the Environment and Land Court held as follows;

“It is our view, that public participation cannot mean that every person must be heard and/or involved during the process of public hearing and/or that the views received during such public hearings must be accepted. It is sufficient that the views have been made and to the extent possible, factored into the final report that will be implemented.

If the position was that whenever there is an organized group or interested persons, who have voiced objection to a development project, the project should be stopped, there would be impediment to development as there will be no one project that will have one hundred per cent approval ratings.”

28. In this case, the fact that so many people attended various consultative meetings, indicates that the Respondents issued notices to the community, leading to sizeable numbers attending the meetings.

29. Having come to the conclusion that the Respondents and the community engaged in public consultations, both prior to and during the implementation of the project, I find that the Respondents did not violate the constitutional rights of the Petitioners.

30. If there was any challenge to the design or the implementation of the project, the proper forum for such challenge would have been the consultative meetings between the community and the Respondents.

31. It is not the role of the Court to determine for either the Petitioners or the Respondents whether or not the project being undertaken would achieve the intended goals.

32. On the other hand, if, as the Petitioners alleged, the project impacted on the individual rights of any particular person, the person so impacted could determine whether or not to pursue an appropriate remedy.

33. In the meantime, I hold that the Petitioners failed to demonstrate that the actions of the Respondents were illegal or ill-advised, or ill-intended or against the law.

34. Accordingly, the Petition fails and is dismissed.

35. However, as this is a Public Litigation, I order that each party will meet his/her own costs of the Petition.

DATED, SIGNED and DELIVERED at KISUMU

This 15th day of October 2019

FRED A. OCHIENG

JUDGE