



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 13 OF 2019

MICHAEL OTIENO NYAGUTI.....PETITIONER

VERSUS

PORT MANAGER-KENYA PORTS

AUTHORITY KISUMU.....1ST RESPONDENT

OFFICER IN CHARGE OF

RAILWAYS POLICE STATION- KISUMU.....2ND RESPONDENT

JUDGMENT

PETITIONERS CASE

Michael Otieno Nyaguti , acting in person, hereinafter referred to as the Petitioner) has come to court claiming that he is petitioner in public interest on behalf of the fisher folk. He is a resident of Kisumu County, a law abiding citizen of Kenya, a public spirited individual and a human rights defender. He is the chairperson of Magnam Environmental Network, that is a registered Community Based Organization in Kisumu County and that was formed with the purpose of promoting environmental conservation, democratic governance, economic development and prosperity of the riparian lake Victoria fisher folk communities. His address for purposes of service of this petition is care of email address; magnamenviromentalnet@gmail.com. Cellphone; 072xxxx.

The 1st respondent is the PORTS MANAGER, on behalf of KENYA PORTS AUTHORITY a parastatal body corporate in charge of operations at ports in Kenya. Their address for purpose of this petition is P.O. Box Kisumu.

The third respondent is the OFFICER INCHARGE OF Railways and Ports Police Station in Kisumu incharge of security operations around the port.

The petitioner claims that vide a verbal quit notice the OCS, railways and port police station WILSON LEKAKENY while accompanied by the Kenya Ports Security officer PETER ARAAP OMMBU, on 26th day of September 2019 ordered the BMU members to vacate the grounds by midday 27th September 2019.

That on the 25th day of September 25th 2019 three officers from Railways Police Station THOMAS PAPA, PETER MUEMA and ROBERT ABONG, visited KICHINJIO BMU fish landing site and delivered information to the members and the general public to the effect that they must leave the area.

That there is no properly served eviction Notice or order on the BMU and its membership as is required by law and the constitution.

That on behalf of the KENYA PORTS AUTHORITY, THE 1st respondent has already caused to be fenced off the fish landing area and the access road to the BMU offices with intent to block passage to the site with resultant denial of entry to fisher folk and the community who normally access the site to buy fish.

It has since emerged that the respondents have resolved to evict the BMU members without provision of a Resettlement Action Plan agreed to through procedurally convened public participation as required by law and the constitution.

That the BMU of Kichinjio has been in operation since the year 1959 and was officially gazetted in the year 1991 and has a fish banda constructed by the government in the financial year 2005/2006.

The obtaining state of the threatened/intended eviction of BMU members who are patriotic law abiding citizens and destruction of wetland around the landing site that is a fish breeding ground is untenable in law because a public gazetted Fish landing site is being taken over and wetland is being destroyed without wide stakeholder involvement including that of National Environmental Management Authority, Water resources Authority and both National and County Government fisheries departments and without public engagement of likely change of use.

The impending eviction is untenable because the BMU members have not been provided with alternative landing site and enabling facilities like fish banda and sanitary facilities as it is being rushed.

That the illegal destruction and reclamation is harmful for the wetland ecosystem and its lake water purification role and detrimental to the fish breeding ground.

That the illegal eviction and relocation of the BMU and its membership will by terminating the BMU's conservation role and protection of the fish breeding ground due to its proximity, expose the lake water to direct contamination due to destruction of the vegetation that helps purify the sewage around the mouth of river Kisat and other hard metallic municipal run off waste.

That the BMU landing site and the surrounding wetland are important sources of livelihoods, earnings and raw materials for mat making, basket making etc, for the fisher communities and a natural habitat for wildlife that if destroyed will lead to destitution amongst the BMU membership and lead to human wildlife conflict.

The Honourable Court is enjoined to intervene and enforce the constitution and relevant laws so as to help protect the property of the gazetted BMU, its membership and the surrounding environment from degradation.

The nature of injury caused or likely to be caused to the general public

The respondents have contravened, threatened and/or violated the following:-

1.1 Article 3 (1) of the Constitution of Kenya 2010.

1.2 Article 22 of the Constitution of Kenya 2010.

1.3 Article 23 of the Constitution of Kenya 2010.

1.4 Article 35 of the Constitution of Kenya 2010.

1.5 Article 42 of the Constitution of Kenya 2010.

1.6 Article 43 of the Constitution of Kenya 2010.

1.7 Article 47 of the Constitution of Kenya 2010.

1.8 Article 48 of the Constitution of Kenya 2010.

1.9 Article 50 of the Constitution of Kenya 2010.

1.10 Article 60 of the Constitution of Kenya 2010.

1.11 Article 62 of the Constitution of Kenya 2010.

1.12 Article 69 of the Constitution of Kenya 2010.

1.13 Article 70 of the Constitution of Kenya 2010.

1.14 Article 163 of the Constitution of Kenya 2010.

1.15 Article 258 of the Constitution of Kenya 2010.

1.16 Article 259 of the Constitution of Kenya 2010.

By threatening the BMU members with forced eviction without alternative relocation site and infrastructure in place and proceeding to destroy and reclaim the lake riparian wetland without following laid out procedure, the respondents have threatened/violated the rule of law and the constitution of Kenya, 2010.

To the extent that the respondents actions is against the law, the respondents have engaged in administrative action that is NOT expeditious, efficient, lawful reasonable and procedurally fair to the fisher communities.

To the extent that the respondents continue with threatening to evict the BMU and its membership and destroying the wetland vegetation and

denying them use of the fish banda, the respondents have violated and continue to violate the fisher communities and the city residents right to a clean and healthy environment through direct exposure to sewerage waste and heavy metal pollution from municipal runoff and denial of right to use of public property.

The actions of the respondents is and will if not stopped continue interfering with the rights of the fisher community to protect the fish breeding ground and biodiversity in the surrounding wetland.

That the Fisher communities' right to exploitation of wetlands products as a source of livelihoods has been infringed and that there is a likelihood of total loss of dependency on the wetland.

That should the wetland be reclaimed there will be resultant further dwindling of fish stock in Lake Victoria that will expose the fisher folk communities to loss of livelihood and income from fishing.

That the wetland as it is currently plays an important role of removing heavy metal substances from the sewage and municipal runoff water a function that the reclamation will eliminate thus exposing the residents and fish to heavy metal contamination and health complications.

That the respondents action if allowed to continue will set a bad precedent that will expose the fisher folk to economic losses and lead to total decimation/destruction of wetlands around the lake through impunities' actions and illegal takeover of fish landing sites. From the foregoing, the respondents have failed to respect, uphold and defend the constitution.

RESPONDENTS CASE

The Respondents did not file a replying affidavit but filed grounds of opposition stating that

1. The application as drawn and filed is totally defective, incompetent and does not lei in law.
2. The orders sought by the applicant have no legs to stand on as they have no basis or foundation.
3. No grounds have been disclosed either in the application, petition or the affidavits to warrant and/or justify this court to grant the orders sought.
4. The 1st respondent is a state corporation charged with the responsibility to maintain, operate improve and regulate the Port of Mombasa and all scheduled seaports along Kenya's coastline. In addition, it manages inland Waterways as well as Inland Container Deports at Embakasi, Eldoret and Kisumu.
5. It is not the function of the 1st respondent to take possession of any land for public purposes and therefore it is not in any way responsible for the loss alleged by the petitioner.
6. The conservatory orders issued should be suspended and/or discharged as they are not in the public interest.
7. The conservatory orders will delay the completion of the port and thereby deny the Government of Kenya the much needed revenue to carry out public services and will result in payment by the Government of higher sums of interest on loans borrowed for the project.
8. The issuance of injunctive orders against a public interest project will result in delay of infrastructural development and massive loss of public funds through payment for idle manpower and plant charges to the contractors.
9. The alleged grounds set out in the application and petition are otherwise an abuse of the court process purely meant to delay the process and ought to be dismissed with costs.

The Petitioner submits that the respondents violated the provision of Article 40 of the constitution of Kenya. Moreover that the Kichinjio BMU members are in legal occupation of the designated fish landing site that is also registered in accordance with the provision of the fisheries management and Development Acts no. 35 of 2016 for purposes of management and development of fishery resources within its area of Jurisdiction. According to the Petitioner, the Kichinjio Fish Landing site is a designated area.

The action of the respondents to evict the petitioner is an act that infringes on the economic rights of the petitioner. He cites Article 43 (1) (2) 3 of the constitution of Kenya 2010. The petitioner further submits that the action the respondents are in breach of the petitioner's right to a fair administrative action.

The 1st respondent on her part submits that there is no evidence of eviction or unlawful occupation of the suit property. The 1st respondent submits that the petitioner has no right to the property and relies on Section 26 (1) a and b of the Land Registration Act.

ANALYSIS AND CONSIDERATION

I have considered the rival submissions and do find that the 1st respondent has misapprehended and misconceived the nature of this petition as the petitioner is not claiming land perse but their right to use the beach as a fish landing base. The Kichinjio Beach is a designated fish landing station as stipulated in the fourth schedule in regulation 42 (1) L.N. 40/1997 52 being fisheries (general regulations Designated fish

landing station.

This court finds that the site being designated as a fish landing base, the Petitioners are entitled to use it as a fish landing base until an alternative site is available to them or a fair procedure is undertaken to de-gazette the site.

The action by the 1st and 2nd Respondents was a breach to the provision of Article 43 of the Constitution of Kenya that provides for economic rights.

Moreover, the same was a breach to the right to a fair administrative action as no notice was given to the petitioner and that the beach was not De gazetted as a fish landing site and no alternative site was given.

Article 47 provides for a fair administrative action thus;-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The respondents were in breach of this provision of the constitution by issuing a verbal quit notice and fencing the fish landing site as no reason was given and that the procedure of closure was unfair.

The upshot of the above is that the petition is allowed. I do grant prayers that the respondents be and are hereby restrained from evicting the BMU members from Kichinjio fish landing site and taking over the properties therein without provision of a suitable relocation site with requisite enabling facilities for sanitary operation and within the requirements of the relevant law.

That the respondents be and are hereby restrained from engaging in any activity that may be harmful to the riparian wetland around Kichinjio BMU landing site in Lake Victoria. Costs of the petition to the petitioner. Orders accordingly.

DATED AND DELIVERED THIS 12th DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE