



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 490 OF 2016**

**IN THE MATTER OF ARTICLE 22 (1), 22, 23 (1), (3) OF THE CONSTITUTION OF KENYA,  
2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 26 (1), 27 (1), (4), (5), 43 (1) (C),  
& (E) AND 47 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE PETITIONER MARY MWANGI**

**BETWEEN**

**MARY MWANGI TRADING AS MOSMAY SERVICES.....PETITIONER**

**AND**

**THE NAIROBI COUNTY.....1ST RESPONDENT**

**THE COUNTY CHIEF OFFICER TRADE,**

**INDUSTRIALIZATION & TOURISM.....2ND RESPONDENT**

**SECURITY COMPLIANCE & DISASTER MANAGEMENT.....3RD RESPONDENT**

**JUDGEMENT**

**Mary Mwangi** (hereinafter referred to as the petitioner) moved to this court citing violation of her fundamental rights and freedoms guaranteed under Articles 26 (1), 27 (1), 28, 43 and 47 (1) of the constitution of Kenya 2010. Briefly, she avers that on 31<sup>st</sup> August 2016 she applied to the Director of Kenya National Archives for permission to use its space along Moi Avenue in Nairobi for an exhibition and that the Director of Kenya National Archives approved her request but asked her to seek and obtain clearance from the Nairobi County. However, the Nairobi County declined her request without affording her a hearing contrary to provisions of the constitution, and that the Respondents have allowed other persons to use the same space, hence, she was discriminated.

The Respondents filed grounds of objection on 29<sup>th</sup> November 2016 stating *inter alia* that the petitioner is not the registered proprietor of the open space in question, that the Respondents have the authority to approve the use of the open space which is within their discretion, that there are by-laws which prohibit hawking and that the petitioners intention is to do hawking business and that the actions complained of are fair and within the law and that the rights in question are subject to justifiable limits.

Both counsels filed written submissions which I have carefully considered. To me the issues that fall for determination is whether or not the refusal by the Respondents to permit the petitioners request violated the petitioners rights under the constitution. It is not disputed that it is within the powers of the country government to grant permission or licence persons desiring to use such spaces or businesses within the city. It is also not disputed that using such spaces within the city without the permission or licence of the county government is illegal. The key question is whether once sought such permission ought to be automatically granted and if not, whether refusal to allow such an application amounts to a breach of the applicants constitutional right.

Among the documents exhibited by the petitioner is a memo dated 21<sup>st</sup> October 2016 from the Nairobi County communicating the refusal and reasons for the refusal.

The rights claimed by the petitioner are not absolute, but fall under the category of rights that can be limited under justifiable conditions such as public interest considerations among them the need to ensure order in the city streets. Granting licences or permission to operate in the city's open spaces is the mandate of the County Government and this court will be reluctant to interfere with such mandate unless it is shown that the person in question acted in excess of his legal authority or violated the law or that the decision complained of is unreasonable and unjustifiable in the circumstances.

I am not persuaded that the Respondents breached the law in any manner in refusing to grant the permission in question. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement<sup>[1]</sup> and the nature and extent of the injury suffered (if any).

In my view the petitioners have failed to discharge the burden of prove to the required standard. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*<sup>[2]</sup> remarked:-

*“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. This fact was succinctly put forth by **Rajah JA** in *Bristone Pte Ltd vs Smith & Associates Far East Ltd*<sup>[3]</sup> :-

*“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”*

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side*. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,<sup>[4]</sup> **Lord Denning** said the following about the standard of proof in civil cases:-

*‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’*

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by both parties and I find that the Petitioner has failed to prove the alleged violation/loss/damage (if any) to the required standard. It has not been demonstrated that the decision complained of is illegal, discriminatory or arrived at without due consideration to the law nor has the petitioner demonstrated why it was necessary for her to operate in the particular location and whether her business was such a nature that it could conveniently be undertaken without interfering with public's right to use the same space as pedestrians and whether or not it could be reasonably undertaken without inconveniencing adjacent occupiers. Finally, granting such a licence is not an absolute right, but it is subject to other public considerations which prevail over private rights.

On the whole, I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondents.

Orders accordingly. Right of appeal 30 days.

**Dated at Nairobi this 22<sup>nd</sup> day of February 2017**

**John M. Mativo**

**Judge**

---

[1] See John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007

[2] {1955} 1 WLR 948 at 955

[3]{2007} 4 SLR (R) 855 at 59

[4] {1947} 2ALL ER 372