



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 14 OF 2016

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF: APPLICATION AND ENFORCEMENT OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 10, 19, 20, 21, 22(1) (2), (B) 23, 186 AND 258 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 39, 40, 47 AND 50 OF
THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: IN THE MATTER OF SECTION 5 OF THE COUNTY GOVERNMENTS
ACT NO.17 OF 2012**

BETWEEN

SAMUEL NJUGUNA MAGU.....1ST PETITIONER

JOHN MUNGAI..... 2ND PETITIONER

SAMUEL WACHIRA WAITHAKA.....3RD PETITIONER

PETER KARURI.....4TH PETITIONER

JOSEPH MUCHIRI..... 5TH PETITIONER

SIMON NG'ANG'A NJUGUNA.....6TH PETITIONER

IBRAHAM NJENGA.....7TH PETITIONER

JOHN MAUNDU PAUL.....8TH PETITIONER

GEOFFREY KAMAU AMOS.....9TH PETITIONER

MARGARET W. MBUGUA.....	10 TH PETITIONER
JAMES K.KAMAU.....	11 TH PETITIONER
FRANCIS NJOROGE.....	12 TH PETITIONER
PAUL KAMAU.....	13 TH PETITIONER
JULIUS KAMAU K.....	14 TH PETITIONER
ISAAC WAWERU K.....	15 TH PETITIONER
FRANCIS KURIA.....	16 TH PETITIONER
JOSEPH NDEGWA.....	17 TH PETITIONER
GITAU GITHONGO.....	18 TH PETITIONER
SHADRACK GICHIMU.....	19 TH PETITIONER
PETER KAMONYE.....	20 TH PETITIONER
SAMUEL KIMANI.....	21 ST PETITIONER
PAUL MACHARIA MUCHIRI.....	22 ND PETITIONER
JOHN KAIRU.....	23 RD PETITIONER
DANIEL GITAU.....	24 TH PETITIONER
NAOMI WANGUI GICHURE.....	25 TH PETITIONER
ESTHER NDUKU MUTISO.....	26 TH PETITIONER
DOMINIC KARIBA.....	27 TH PETITIONER
PETER MUCHIRI.....	28 TH PETITIONER
KAMAU KABIRU.....	29 TH PETITIONER
ROBERT MUGAMBI MUTERE.....	30 TH PETITIONER

(Suing in their own behalf and on behalf of all other fresh produce vendors being harassed, intimidated, unfairly curtailed and discriminated against in undertaking trade at Makueni County markets)

VERSUS

MAKUENI COUNTY GOVERNMENT.....	1 ST RESPONDENT
CHARLES MUTHUKA.....	2 ND RESPONDENT

ONESMUS WAMBUA.....3RD RESPONDENT

DAVID NYUMBU.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

RULING OF THE COURT

The Application

1. The application before the court is a Notice of Motion dated **18th October, 2016** filed in the Petition herein of the same date. The motion is pursuant to **Article 22(2) (b) & 23 of the Constitution, rules 3, 4, 5, 13, 19 and 23 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. The application prays for the following orders;

- a. That this application be certified urgent and be heard ex parte in the first instance.
- b. That pending the hearing and determination of this application and/or Petition, the court be pleased to issue a conservatory order of injunction to restrain the respondents jointly and severally from enforcing the 2.00p.m trading deadline/restriction imposed against the Petitioners herein or in any manner whatsoever interfere with their business of selling cabbages in various markets in Makueni County.
- c. That pending the hearing and determination of this application and/or Petition, the court be pleased to order the 1st respondent to prevent the 2nd respondent – 4th respondents and their gangs from engaging in intimidation, harassment of the Petitioners and causing lawlessness and disorder in the various markets within Makueni County.
- d. That costs of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by affidavit of **Samuel Njuguna Magu** sworn on **18th October, 2016** on his own behalf and on the behalf of the rest of the petitioners; and a further affidavit sworn on **6th December, 2016** by the same person.

3. The applicants' case is that the Petitioners/applicants are legitimate business persons who engage in the trade of fresh produce, cabbage in particular. They source for the same in Nyandarua and deliver to markets around Makueni County, an activity that they have undertaken for more than twenty years. They transport the same using their trucks which they lawfully pay for, and also pay all the county levies at all county markets that they offload to and/or sell the produce. Once the above payments are done, the petitioners/Applicants herein are allowed to sell their produce in these respective markets from 6.00a.m to 6.00p.m without any hindrance. Between the months of June and August, 2016, the 2nd -4th respondents, without any lawful authority, threatened to erode this lawful free trade by imposing daily 2.00p.m trading deadline to the Petitioners/applicants, beginning on 8th August, 2016. The 2.00pm deadline was indeed imposed as from 8th August, 2016 and is discriminatorily being enforced against the petitioners/Applicants on account of being vendors of cabbage who are predominantly members of the Gikuyu community. The applicants' case is that whereas under **Articles 39, 40 and 186 of the Constitution** the applicants have a right to engage in their business of selling cabbages upon payment of the requisite County Government charges, the respondents are preventing them from enjoying this right beyond 2.00p.m in the various market centres in Makueni county. Under **Article 27 of the Constitution** the Respondents are prohibited from making or proclaiming written or verbal laws to restrict operations or business of one set of traders which do not apply to other traders. In the instant case the Respondents have restricted the applicants to operate between 6.00a.m and 2.00pm despite them paying to operate upto 6p.m like other traders. The Petitioners' case is that they are solely and exclusively subjected to unfair, oppressive and cumbersome restrictions on account of being cabbage traders and members of the Gikuyu

community. Unless this court grants the prayers sought herein, the Petitioners/Applicants will continue to suffer losses and risk losing their livelihood and that of their dependants. It was submitted that the actions and omissions of the respondents contravene and subvert **Articles 3, 4, 5 and 6 of the Constitution** which protects the integrity of the Kenya nation in the context of devolution. As citizens of Kenya, **Articles 12, 39 and 40 of the Constitution** protest the Applicants' right to engage in the business in Makueni County and anywhere else in Kenya on the same terms as any other Kenyan citizen and residents of particular counties. It is submitted that in the best interest of justice and the Rule of Law, the prayers sought by the Petitioners/Applicants be granted.

The Response

4. The motion is opposed by the 1st, 2nd, 3rd and 4th respondents, while the 5th respondent has not filed a response. The 1st respondent filed a replying affidavit and a Supplementary affidavit sworn by **Alidan Maithya Mbinda** sworn on **8th November, 2016** and **22nd November, 2016** respectively.

5. The 1st Respondent refutes the allegation of discrimination on grounds of ethnic origin, stating that the said allegation of discrimination on ethnic grounds is sensational, scandalous and calculated to raise tension in an already emotive issue of social and economic inclusiveness within Makueni County Markets. Emotive because there are serious competing social and economic interests amongst the different stakeholders. They include the wholesalers (represented by the petitioners) and the retailers and hawkers represented by the 2nd to the 4th respondents. The 1st respondent's case is that the county government is the constitutional regulator of trade under paragraph 7(a) and (c) of the fourth schedule to the constitution as read together with Article 186. The County government has no private interest in the dispute. Its aim is to balance the various competing interests in the public interest.

6. The 2nd, 3rd and 4th respondents filed a replying affidavit sworn on 17th November, 2016 in opposing the application herein. According to these respondents' affidavits, it is clear that the main issue in contention was how to equitably share trading hours and spaces among the various classes of business traders. These respondents state that it was agreed that all wholesalers of fresh produce would sell from 6.00am to noon and thereafter give way to retailers and hawkers which agreement was to take effect in May, 2016. The issue of trading hours and practices had overtime generated a lot of tension between the various classes and threatened to become violent after wholesalers started engaging in retail and selling their products at lower prices than the retailers in the afternoon in order to clear their stock before markets close. Following the consultative forum held in March, 2016, it was agreed by the traders to trade between 5.00am and 3.00pm. The said agreement was recorded in handwritten minutes and signed by all members present including the petitioners and which minutes the 2nd respondent delivered to the ECM for trade tourism and co-operatives. The 2nd – 4th respondents never harassed, intimidated or threatened the petitioners or prevented them from accessing the markets which are regulated for the County Government. Further, the trading hours were not imposed by the respondents but were arrived at through a public and stakeholders consultative process. The petitioners are allowed to sell their goods both in wholesale and retail as from 6.00a.m upto 2.00pm looking into the interest of traders as well as the consumers. In case the application herein is granted, a lot of injustice shall prevail.

Submissions

7. The applicants submitted that the principles in granting conservatory orders have been met. In ***Centre for Human Rights and Democracy & 2 Others vs. Judges and Magistrates Vetting Board & 2 Others***, a three-judge bench of this Court explained that in deciding on whether to grant conservatory orders the following factors should be considered:-

The credentials of the petitioners;

The prima facie correctness or nature of information available to Court;

Whether the grievances expressed in the applying for conservatory orders were genuine, legitimate,

deserving and or appropriate;

Whether the applicant had shown or demonstrated the gravity and seriousness of the dispute; and whether the petitioners had engaged in wild, vague, indefinite or reckless allegations against the respondent.

8. The petitioners submitted that the purpose and aim of conservatory orders are to give interim protection against the continued violation of constitutional rights during the hearing of the suit. They submitted that they have satisfied the above five requirements or conditions for the grant of conservatory orders as follows:

a. The petitioners are *bona fide* cabbage traders in Makueni County and therefore they have requisite *locus standi* and credentials to seek reliefs under **Articles 20 – 23 of the Constitution**.

b. The Petitioners have placed sufficient material before the Court to prove the case on a *prima facie* basis.

c. The grievances of the Petitioners are genuine, legitimate and the Respondents' affidavits confirm that the petitioners stand to suffer real prejudice and adversity in operating their business if the measures taken by the Respondents take effect.

d. From the pleadings and evidence before the Court the Petitioners have grave and serious dispute against the Respondents. The livelihoods and businesses stand to be acutely affected or disrupted if the Respondents decisions and actions were to stand.

9. In submitting that they had established a *prima facie* case, the petitioners submitted that the principle of legality and constitutionalism underscored by **Articles 2, 3 and 10 of the Constitution** requires the First Respondent to base its decisions and actions on duly enacted law, rules and regulations. In the instant case the First respondent's actions and decisions have no basis in any law. Before the First Respondent could lawfully alter the hours of wholesale business, it was enjoined to undertake public consultations of stakeholders. However, the First Respondent has not demonstrated that it ever subjected any proposal on time limits to stakeholders meeting or notified the Petitioners of such meeting to discuss such proposals. The evidence on record shows that only cabbage wholesale traders have been targeted for reduction of their trading hours. This is discriminatory within the meaning of **Article 27 of the Constitution**. In the same vein the Petitioners' rights to protection of law have been violated as they have been subjected to intimidation and harassment by gangs controlled or incited by the 2nd – 4th Respondents. In the premises, reason, fairness and expediency demand that the conservatory orders sought be granted to prevent continued violation of petitioners' fundamental rights and freedoms and to ensure that the Petition herein is not rendered nugatory.

10. On their part, the respondents submitted that the County government of Makueni is a creature of the constitution clothed with express constitutional powers to regulate trade. There is no suggestion that the government has acted in excess of those powers in determining market hours. The petitioners' claim that the government has through third parties harassed them and denied them access to the markets is not supported by evidence. The 1st respondent has through annexure "AM 2" and "AM 3" demonstrated how the decisions on market hours were arrived at, and how they are to be enforced. *Prima facie* therefore, it was submitted that the 1st respondent is within its mandate to enforce market hours. The process through which the decision was reached is clearly fair, inclusive and participatory. The decision has not been shown to be unreasonable or discriminatory. On the contrary, the regulation of market hours serves the greater good in securing and protecting equitably the competing claims of the various stakeholders.

11. The respondents submitted that there is no suggestion that the trade circulars issued by the 1st respondent are unenforceable or unlawful. A county government is within its lawful mandate to perform its constitutional function by notices, circulars or other directives. This observation was made by the court in **Nairobi Metropolitan PSV Sacco Ltd & 25 others –Vs- County Government of Nairobi petition number 486 of 2013 (eKLR)** where the court observe that where a function is conferred on a particular level of government such level of government does not need bylaws to perform its functions.

12. The respondents further submitted that in order to address the question of irretrievability or otherwise the court needs to examine what the petitioners are likely to suffer if conservatory orders are not issued. We have to weight this against what the effect of the conservatory order would be. The petitioners have alleged that they stand to suffer economic losses. They have even gone further and estimated the losses they allege to have suffered. The respondents submitted that it can be surmised that the loss likely to be incurred by the petitioners is economic and measurable in money terms. It's by no means irreparable or irretrievable. The petitioners are still in business. Indeed the matter complained about is a limitation on the number of trading hours from 6pm to 2pm in most of the markets while on other days the petitioners trade up to 11pm. This is a reduction of trading hours from 12hrs in a market day to 9 hours a total reduction of 3hours. The reduction in hours is not drastic nor is it likely to occasion the petitioners substantial loss. The respondents submitted that in the worst case scenario the petitioners can be said to potentially incur total of 25% reduced profits if the profits are directly proportional to time.

13. On the converse, approximately 4,000 retailers and over 18,000 hawkers are under threat of total exclusion from participating in socio economic activities on market days. They too deserve their right to human dignity under Article 28 respected and protected. It was submitted that this deprivation has already created tension in a hitherto conducive environment. It is in the public interest that peace and security of every person be guaranteed by ensuring that the tensions don't escalate into conflict. The petitioners have already alluded to incidences of violence and destruction of property in competitions for markets. Whereas the report is news to the 1st respondent, it is matter of concern which cannot be ignored.

Determination

14. I have carefully considered the petition and the motion, together with submissions of the parties. The only issue I raise for determination is whether or not the Petitioners have established a prima facie case for the grant of conservatory orders sought herein.

15. From the foregoing, it was submitted that the petitioners have not demonstrated likelihood of irreparable loss or irretrievable damage. The alleged loss is financial and quantifiable by the petitioners own admission. In the event the petitioners were to succeed in the petition, the subject matter would not have been lost. They would resume operating as before. The markets would still be available.

16. In Muslim for ***Human Rights (Muhuri) & others – Vs- Inspector General of Police & 2 others [2014] eKLR***, the court observed that in order for a conservatory order to issue “... the court required a prima facie case...; irretrievability or irreparability if conservatory order is not granted subject matter is irretrievably lost... and a balancing of the interests of the applicants and the respondents...”

17. On the contrary, the other stakeholders at risk of total exclusion would not be so fortunate as their livelihoods cannot be put on hold. Weighing the interests of the two sides, the balance of convenience tilts against issue of a conservatory order. In terms of Article 24, the limitations of market hours is justified to ensure that the enjoyment of the rights and freedoms of the petitioners does not prejudice the rights and freedoms of others.

18. This 3rd and critical principle, in the words of Justice Mumbi Ngugi in ***City Riders Sacco & 11 others v. County Government of Nairobi & 3 others [2016] eKLR*** was enunciated by the Supreme Court in the **Peter Munya case SCK Pet. 2 of 2013** where Supreme Court Justices Ojwang and Wanjala JJSC stated “...conservatory orders bear a more decided public law connotations; for these are orders to facilitate ordered functioning within public agencies...conservatory orders would be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributed to the relevant causes...”

19. This court finds that it is the mandate of the 1st respondent to regulate matters relating to trade and for the greatest benefits of the greatest number not just one segment of traders. The petitioners have not demonstrated constitutional entitlement or other rule entitling them to operate for 12 hours. They have not demonstrated the limitation of their right to trade is unreasonable or unconstitutional or unjustifiable in an open democratic society based on human dignity and freedom as envisaged under **Article 24 of the**

Constitution. On the other hand, the limitations taking into account fair trade principles, is reasonable, justifiable in order to protect the social economic rights of others.

20. The 1st respondent's exercise of its constitutional function is legitimate because;

- a. The petitioners have not been prevented from trading.
- b. The restriction does not apply to any ethnic group but rather to all wholesalers.
- c. The trading hours were not imposed on the petitioner or other stakeholders by the 1st respondent but were rather the product of a very elaborate consultation process in which the petitioners fully participated and the outcome of which they agreed to.
- d. The 1st respondent has taken specific and reasonable steps to cushion the petitioners from potential losses by allocating additional market days in the main markets and also authorizing the wholesalers to retail up to 2pm.

21. Considering the prevailing practice in other markets which the 1st respondent had demonstrated, this court believes that the petitioners have neither been treated unfairly or discriminatively. In sum the petitioners are arguing against any form of regulation whatsoever which would be against the public interest. The 1st respondent has a duty to ensure fairness in trade practice. This involves balancing the competing interests of wholesalers, retailers and hawkers. Caution has to be observed in grant of injunctions against a public body, in this case a constitutionally mandated county government, carrying out its constitutional function.

22. In *Nairobi Metropolitan Sacco [2013] eKLR* the court in considering an issue of limitation not very dissimilar with the present case observed that

“... This court cannot direct the 1st respondent on how to exercise its duty of levying parking fees...it is not enough for the petitioners to state that they will shy away from entering the city because of high parking fees...they have a duty to demonstrate how that will affect the national economic policies and they have failed to do so...”

23. This court finds that the petitioners have similarly failed to demonstrate how the limitation in market hours would affect the wider economy over and above their personal business interests.

24. Accordingly, the petitioners' Motion before the court is dismissed with costs to the respondents.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2017

.....

DAVID KEMEI

JUDGE

In the presence of:

Munguta – for 1st Respondent

Kavita – for 2nd, 3rd, 4th Respondent