



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

PETITION NO.13 OF 2016

**IN THE MATTER OF ARTICLE 73,37,1,3,23,186 AND FOURTH SCHEDULE OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNCTIONS AND POWERS OF NATIONAL AND
COUNTY GOVERNMENT UNDER ARTICLES 186 AND SCHEDULE OF CONSTITUTION OF
KENYA 2010**

BETWEEN

**MOSES KARANI BARABI SAMSON MUNENE NCHEBERE AND OTHER PETITIONERS AS
NAMED IN THE SCHEDULE ANNEXED.....
PETITIONERS**

-AND-

HON MPURI M’ ABURI.....1ST RESPONDENT

WANJA MUSA.....2ND RESPONDENT

JUDGMENT

[1] In this Constitutional Petition, the Petitioners have sought the following declarations:

1. A declaration that the Petitioners rights individually or in association with others to a legal and rightful demonstration guaranteed by Article 37 of the Constitution have been and will be contravened if these incited demonstrations are allowed to continue.
2. A declaration that the respondents have contravened Article 186 of the Constitution and Fourth Schedule in that the functions and powers of county government set out have not been observed and that decisions regarding demonstrations, assembly and picketing leading to the closure of the markets in question is unlawful, illegal and against the rule of law.
3. An order of prohibition or injunction against the respondent restraining them from undertaking or implementing the acts (closure of markets) until safeguards and remedies in respect of the subject matter of the declarations above are put in place to the satisfaction of the honourable court.
4. This court to issue such further orders and give such directions as it may deem fit to meet

the ends of justice and the protection of the constitutional rights of the Petitioners and the residents of the affected areas.

5. An order for compensation to the county government and business people for revenue and income respectively, incurred as result of the closure of the markets.

6. This honourable court to quantify and give compensation directions as it may deem fit to meet the predicaments and sufferings of the business people and county government of Meru.

7. The cost of the Petition to be awarded to the Petitioners as against the county government and business people.

Brief facts

[2] The Petitioners claim that Mikinduri market was closed on 19th May 2016 as a result of demonstrations by Kunati and Kiguchwa residents. These demonstrations were illegal and have had adverse effects on business people who have incurred losses amounting to Kshs 15,000,000. Again, they alleged that goods worth Kshs 7,000,000 were destroyed following incitement by Hon Aburu.

Respondents: it wasn't me

[3] The 1st Respondents filed a Replying Affidavit in opposition to this petition. He deposed *inter alia*:-

(i) That the orders sought were fuzzy, vague, ambiguous and untenable;

(ii) That the 1st Respondent had never at any given time closed or attempted to close markets as alleged;

(iii) That he did not have powers to do so and that he had never incited members of the public whatsoever to close any markets or decline to pay any revenues to the county government; and

(iv) That further the Petitioners ought to have annexed evidence to demonstrate that he had actually perpetrated the above acts, but none had been exhibited.

(v) That if at all it was the county government of Meru which was aggrieved as gleaned from the petition, then it ought to have applied to be joined as a party to the proceedings or initiated the current proceedings by itself.

Based on these reasons, the Respondents contended that the Petition was a non-starter and a classical case of abuse of court process.

Directions

[4] On 15th September 2016, it was agreed that this petition shall be disposed of by way of written submissions. On 23rd February 2017, none of the parties had filed submissions as had been ordered by court despite having been given ample time to do so. The default prompted the court to rule that it would determine the matter on the material before court.

DETERMINATION

[5] None of the parties filed submissions as had been ordered by the court. I have, however, carefully considered this Petition together with the affidavits filed. The Petitioners have alleged *inter alia* that their rights individually or in association with others to a legal and rightful demonstration guaranteed by Article 37 of the Constitution have been and will be contravened if the *incited* demonstrations are allowed to continue. I will place these facts to the legal threshold.

[6] Needless to state that the Petitioners ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation. On this see the decision by the Court of Appeal recently in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR* that:

“The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.”

[6] Applying the test, other than stating their grievances in broad and generalized terms, the Petitioners have not stated how their rights will be or the manner in which they have been contravened. In addition, they have not shown that the Respondents were responsible for the illegal demonstrations as well as closure of the markets in issue which resulted into losses in the sum of Kshs. 15million. There has to be a direct connexion between the Respondents’ actions and the alleged illegal demonstrations herein. Again, claims of incitement are very serious matters which would require strict proof. I say these things because, on one hand, demonstrations are a constitutional mandated as long as the persons exercising that right are peaceable and unarmed; and on the other hand, incitement is a criminal offence. The petitioners ought, therefore, to show in details the specific acts by the Respondents which constituted incitement and infringement of rights. No material was presented towards that end. I should also state that the decision to close markets is made by the County Government of Meru and not the Respondent. But one thing is quite disturbing here; how would the county government continue to pay salaries to market masters and revenue collectors for being idle? If this is true, such is a matter that does not pass the constitutional yardstick on prudent utilization of public funds. I do not understand, therefore, why the County Government of Meru was not made a party in these proceedings in order to answer to these serious allegations of breach of the Constitution and the relevant law. There is, however, no evidence to prove the serious allegations.

[7] Before I close, let me say the following. The Petitioners are seeking a declaration that their right to a legal and rightful demonstration guaranteed by article 37 of the Constitution has been contravened if what they call “incited demonstration” are allowed to continue. There is a problem with that statement. I have not been told that the petitioners wanted to stage a lawful demonstration but were denied or prohibited from doing so. In fact they have not alleged anything of that kind. They are complaining that continuation of the “incited demonstration” resulted into contravention of their right to demonstrate. How will their right to demonstrate be affected by another person’s exercise of similar right? These allegations do not make legal sense. Accordingly, I am not able to find any violation of the petitioners’ rights under article 37 of the Constitution. In the absence of proof, I am unable to find any violation of the Constitution by the county government. On that basis, I dismiss the petition herein. Given the nature of these proceedings, I will order each party to bear own costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 15th day of May 2017

F. GIKONYO

JUDGE

In the presence of:

M/s. Nyaga advocate for Muriuki advocate for 1st respondent

M/s. Kiongo advocate for Kiogora Mugambi advocate for petitioner

Mr. Mutegi advocate for 2nd Respondent

F. GIKONYO

JUDGE