



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KAKAMEGA**  
**ELC PETITION CASE NO. 6 OF 2019**

**ERNEST IKOHA**

**CHRISTOPHER MILIMU LIGTAMI**

**GEOFFREY J. MWAYULI**

**CHRISTINE K. SHIMENGA**

**DAVID HEYI**

**HABEL NETIA**

**ARTHUR J. MWAYULI**

**DESMA WERE MUKHANJI**

**VICTORIA TOSI**

**SMASON OMBOYO MUKA**

**NICHOLAS LISECHE**

**STANLEY MILIMU BULINDA**

**SAMMY LIGUYANI**

**PETER ACHEVI ANDOLE**

**BENJAMIN ALUBALA**

**MATHEWS LILUNGU**

**THOMAS MATANJI**

**MARY SHITAMBASI**

**EMMANUEL P.K. SHIKOLI.....PETITIONERS**

**VERSUS**

**JUDGEMENT**

The petition dated the 13<sup>th</sup> day of June, 2014 as amended on 4<sup>th</sup> January, 2017 pursuant to an order of this court made on the 8<sup>th</sup> day of December, 2016. The petitioners rely on the said petition, the amended petition, affidavits in support thereto, the further affidavit of the 1<sup>st</sup> petitioner sworn on 24<sup>th</sup> July, 2014 and his supplementary affidavit filed with these submissions. The petitioners seek a declaration that their constitutional rights have been contravened by the respondent warranting appropriate compensation in addition to costs of the petition and any other available relief.

The petitioners submitted that at all material times they were business persons at Khayega market off Kakamega-Kisumu road in Kakamega County. The petitioners were invited by the then County Council of Kakamega to construct temporary structures commonly known as ‘kiosks’. The kiosks were later converted into permanent shops by the County Council of Kakamega Minute No. 3 of 2001 of the planning, works and markets committee made on the 28<sup>th</sup> February, 2001. The minute is annexed to the affidavit of Ernest Ikoha (the 1<sup>st</sup> petitioner) in support of the petition. The County Council of Kakamega was the predecessor of the respondent. The petitioners had hence owned/plied their business at the said market. Some of the petitioners operated the shops while others let the same to other business people as the petitioners’ tenants. The petitioners had at all material times paid rates to the said County Council of Kakamega and to the respondent. Annexed to the affidavit of Ernest Ikoha (the 1<sup>st</sup> petitioner) in support of the petition and marked EL 1 are copies of permits, applications, property rates, payment requests and payment receipts. The respondent on 8<sup>th</sup> June, 2014 posted a 14-day notice of its intention to demolish the petitioners’ shops at the said market. A copy of the said notice is what is annexed to the affidavit of Ernest Ikoha (the 1<sup>st</sup> petitioner) in support of the petition marked El 3. The said notice was pasted on the doors and walls of the petitioners’ shops. The petitioners filed this petition to stem the threatened demolition restraining the threatened demolition pending inter-parties hearing. The court heard the petition on 25<sup>th</sup> July, 2014 and vacated the conservatory order on 17<sup>th</sup> September, 2014. The petitioners were granted 14 days’ temporary stay pending a formal application. The petitioners then lodged a notice of their intended appeal to the Court of Appeal and on 29<sup>th</sup> September, 2014 by notice of motion of even date filed for a formal stay and were ex-parte granted 14 days stay pending hearing inter-parties on 13<sup>th</sup> October, 2014. The said application for stay was heard inter-parties on the said 13<sup>th</sup> October, 2014 and interim stay orders extended pending the ruling thereof reserved for 13<sup>th</sup> November, 2014. That despite the stay order and before the pending ruling could be delivered, the respondent demolished the petitioners’ said shops between the night of 31<sup>st</sup> October, 2014 and 1<sup>st</sup> November, 2014. The court nonetheless delivered the ruling on 13<sup>th</sup> November, 2014 allowing stay pending appeal. The petitioners went on with their appeal in the Court of Appeal at Kisumu Civil Appeal number 11 of 2015 which was heard and the Court of Appeal on 5<sup>th</sup> November, 2015 ordered that the petition be heard in the High Court by a judge other than the then trial judge. But because of the act of demolition alluded to above, the facts of the case had materially changed and the petition could not be heard in its original form. It then became necessary that the petition be amended hence the application for leave and the consequent order for amendment. The respondent proceeded with construction of what it calls a modern market and did not allot any of the petitioners with stalls contrary to its allegation that it would give priority to the petitioners in the new market. In any case, the petitioners maintain that the new market is inferior to their demolished shops as it consists open space lacking the security of permanent shops. The petitioners state that their fundamental rights have been violated on the basis that they were not afforded adequate notice to vacate, they were not given a fair hearing under Article 47 of the Constitution and also that their rights to private property as enshrined under Article 40 of the Constitution were infringed.

The respondent submitted that, it is now a well settled principal, in *Anarita Karimi Njeru vs. Republic (1976-80) 1 KLR 1272*, 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. This is important not just to allow the respondent to know the case that it has to answer to, but also to enable the court make a clear determination on the alleged violations. That the land subject of the petition is public land that belongs to the County Government of Kakamega as trustee for the residents and inhabitants of the said County. The land and market aforesaid were previously, before the advent of the County Government of Kakamega owned, administered, and/or managed by the County Council of Kakamega. Since the year 1982 when the master plan for the Khayega Market was developed, the said parcel of land was earmarked and planned for the construction of a public open air market for Khayega town. The land in dispute is, therefore, public utility land and the petitioners admit this fact in their amended petition. The petitioners cry foul that their fundamental rights have been violated on the basis that they were not afforded adequate notice to vacate, they were not given a fair hearing under Article 47 of the Constitution and also that their rights to private property as enshrined under Article 40 of the Constitution were infringed. The Constitution guarantees at Article 40 the right of every citizen to own property in any part of Kenya and not to be deprived of property. It provides as follows:-

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property ...

a. Of any description; and

b. In any part of Kenya.

(2) Parliament shall not enact a law that permits the state or any person –

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description .....

They submit however that, one cannot claim to be deprived of that which he does not have rights over. The petitioners have readily conceded that they have been occupying public property, Khayega Market. They have no proprietary interest in the said land. Clearly, therefore, their claim that their rights under Article 40 of the Constitution have been violated has no basis. They do not own the land and they, therefore, cannot be deprived of that which they have no rights over. They relied on the decision of Hon. Lady Justice M. Ngugi in *Nairobi HC Petition No. 58 of 2011 Veronica Njeri Waweru & 4 Others vs. City Council of Nairobi & 2 others* and submit that there has

been no violation of the petitioners' rights to property under Article 40 of the Constitution.

The petitioners allege violation of their rights under Article 47 of the Constitution. They state that though they were given notices to vacate the land, such notices were, "not only inhuman but vague and unreasonable." It is their submission that the petitioners were licensees as opposed to allottees/proprietors to the suit property. Their licences did not convey any proprietary interest in their favour over the property. All that the petitioners were entitled to as licensees were reasonable notices. The petitioners have not established any evidence that the 14 days notice given to them was not reasonable.

This court has considered the petition and the submissions therein. The petitioners state that their fundamental rights have been violated on the basis that they were not afforded adequate notice to vacate, they were not given a fair hearing under Article 47 of the Constitution and also that their rights to private property as enshrined under Article 40 of the Constitution were infringed. In the case of Kenya Bus Company vs. Attorney General & Others Misc Civil Application No. 413 of 2005 the court held that;

- (i) *An unchallenged court order cannot be the basis of a Constitutional application (to prevent execution)*
- (ii) *Non disclosure of material facts is sufficient to warrant the dismissal of a Constitutional application*
- (iii) *A Constitutional court has inherent powers to prevent abuse of its process*
- (iv) *A Constitutional application brought in violation of fundamental principles of law is incompetent and should be dismissed.*

In the case of Booth vs. Mombasa Water Company Misc Civil Application No. 1052 of 2005 the court held that;

*"I wish to reiterate and to reinforce the principles I endeavored to define and establish in my recent ruling in the case of LABHSONS LTD v MANULA HAULIERS LTD HCCC No 204 of 2005 where I held inter alia in the articulation of and enforcement of fundamental rights this court cannot disregard the fundamental principles of law such as res judicata, limitation, laches, and if I may add to the list estoppel, waiver and compromise."*

*"Our Constitution does assume that there are also fundamental principles of law in existence although the constitution does itself so to speak occupy the position of the super structure. That superstructure has a foundation and one of the foundations is the existence of fundamental principle of law. It is reckless for applicants to ignore the fundamental principles of law when filing or articulating constitutional applications. Many of the identified fundamental principles of law are based on public policy principles of fairness and justice..."*

*"Our Constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, values and on political cultural social and economic situations. Its dynamics and relevance is deeply rooted in these values. Cut off from these factors it would become redundant and irrelevant. I refuse to accept that the Constitution is a skeleton of dry bones without life and spirit. The least it is expected to have and which we cannot deny it is the spirit of its Framers. To me we must give it much more:"*

The petitioner alleges violation of fundamental rights and freedoms and is therefore his duty to plead his case with particularity, in the case of Anarita Karimi Njeru vs. The Republic (1976-1980) eKLR 1272 where the Court established the principle that a person seeking redress from the High Court on a matter which involves reference to the Constitution should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed. The petitioners were licensees in a public market. The principle in the **Anarita Karimi Njeru** was clarified in the case of **Trusted Society of Human Rights Alliance vs. Attorney General & 2 others, Petition No. 229 of 2012**. The Petitioners in the instant case had failed to meet the test as they have not identified the specific private property they were calling the Court to protect.

This principle was re-affirmed by the Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** where it was stated as follows:

*"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."*

The facts of this case it is in my view that the petition lacks any specificity and a remedy existed in other laws such as malicious damage to property. A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim. Constitutional jurisdiction should not be trivialised and should be confined to purely constitutional matters. Where the ordinary law provides for relief that relief must be pursued. For those reasons I find this petition is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF JULY 2020.**

**N.A. MATHEKA**

**JUDGE**