



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL PETITION NO. 8 OF 2015

KITALE SHUTTLE LTD..... 1ST PETITIONER

KANGAROO SHUTTLE SERVICES2ND PETITIONER

MAHOGANY MWANAKE CO. LTD..... 3RD PETITIONER

NORTH RIFT LUXURY SHUTTLES LTD 4TH PETITIONER

GREENLINE CO. LTD. 5TH PETITIONER

GREAT RIFT EXPRESS SHUTTLE SERVICES LTD. 6TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF T/NZOIARESPONDENT

J U D G M E N T

1. The six (6) petitioners are limited liability companies registered under the Company Act (*Cap 486 LOK*) carrying out public transport business within the Republic of Kenya. The respondent is the County Government of Trans-Nzoia established and provided for under *Articles 6(1) and 176(1) of the Constitution of Kenya, 2010*.

2. It is the petitioners' prayers that declaratory orders be issued to the effect that *Firstly*, that the respondent is in violation of Article 47 of the Constitution and *Secondly*, that the violent eviction or removal from the offices and / or parking bays without an alternative designated place to carry out their business threatened their right to life guaranteed by *Article 26 of the Constitution, right to freedom and security under Article 29, right to property under Article 40, and Social Economic Rights guaranteed by Articles 43 of the Constitution*.

3. The prayers, herein are founded on specified provisions of the Constitution to wit *Articles 2, 3, 10, 19, 20, 22, 27, 40, 43, 47, 48, 50, 165 and 258*. The petitioners have however zeroed in on *Articles 40, 43 and 47* for purposes of the prayers sought but although *Articles 26 and 27* are involved in the prayers they are not included as being part of the enabling provisions for the petition which is grounded on facts that the petitioners are duly licensed public transport operators with a combined fleet of over three hundred (300) passenger service vehicles which have been operating from a designated place of business within Kenya Railways Corporation Land with the knowledge of the defunct Kitale Municipal Council and with assurances that there shall be no arbitrary eviction and re-location of the petitioners without first being provided with a suitable alternative place of business.

4. That, similar assurance were made by the respondent when it took over from the said Municipal council and in that regard various meetings were held with the respondent on **16th January 2015, 22nd January 2015 and 27th January 2015** whereupon the respondent re-assured the petitioners and undertook not to evict them without an alternative place of business and also that re-location (if any) shall be systematic and with consultation of the stakeholders and further that the petitioners would be allowed to operate within their offices as mandatorily required by the **National Transport Safety Authority (NTSA)**

5. The respondent also undertook to ensure that the alternative place of business shall be provided with basic amenities such as Water, Toilets, Lighting etc. It is the petitioner's contention that despite all the assurances and agreements, the respondent issued a notice on the 23rd March 2015, requiring the petitioners to move out of the designated place of business. This was followed by forceful eviction of the petitioners on the 28th March 2015, from the designated parking bay and offices and a threat not to issue them with single business licences for both the parking bays and offices.

6. The petitioners further contend that they have operated at the designated bay for more than ten (10) years but that the respondent has vowed to continue harassing them while ignoring and neglecting their request to regularize co-existence between themselves and the respondent as per the resolution of the meetings aforementioned and also instructing its (Respondents) enforcement department to forcefully evict the petitioners and its licensing department not to renew the petitioners licences with effect from 1st January 2015.

7. The petitioners maintain that the decision made against them by the respondent was so made without consultation. They contend that the decision was made without them being accorded the opportunity to be heard thereby leading to a violation by the respondent of their constitutional rights under Article 40, 43 and 47 of the constitution. Hence the prayers sought herein against the respondent.

8. It is clear from the foregoing that the petitioners main complaint is essentially based on Articles 40, 43 and 47 of the Constitution. Whereas, Article 40 is invoked to denote present existing circumstances, Articles 43 and 47 are invoked to seemingly denote the future i.e an expected threat or continuation of violation of their rights if the orders sought are not granted by the court.

9. Under Article 258 (1) of the Constitution, every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. Indeed, this petition is a claim that the constitution has been contravened or is threatened with contravention by the respondent.

If that be the case, the petitioners would be entitled to remedy by way of declaratory orders and / or injunction orders against the respondent as the Constitution being the Supreme Law of the Country binds all persons and all state organs.

10. A state Organ such as the respondent is required in the exercise of its functions under any law to act as authorized or in accordance with the Constitution. Any violation of individual's fundamental rights in the exercise of statutory or lawful functions would constitute a gross breach of the Constitution for which the court as the defender of the Constitution is obliged to act.

11. The basic issue for determination in this matter is whether the petitioners are entitled to the prayers sought herein on the basis of all the facts aforementioned.

In its reply to the petition, the respondent's Assistant County Secretary, **Pius Munialo** averred that the petition has been overtaken by events since the bus park has already been re-located from the **Central Business District (CBD)** to a new site along the Kitale – Eldoret highway opposite the Kitale Museum which new site is already operational with basic utilities.

12. The respondent denied the alleged violation of the petitioners right by itself and avers that the decision and action to re-locate the bus park from the CBD to the new site was done in good faith and

in the public interest to improve the face of the town and for better planning. That, the action of re-locating the park was preceded by extensive consultations and public participation through a Public meeting attended by stakeholders. That, a public notice dated 23rd March 2015, was issued prior to the re-location exercise and was complied with by the operators who are currently operating at the new site.

13. The respondent further avers that the decision to re-locate to the new site applied to everybody and as such, the petitioners were not an exception and are indeed happy operating at the new bus-park. That, any order by the court to return the petitioners to the old bus-park at the CBD will result in loss of property and business for the operators and traders who have since then moved to the already operational new site which is suitably located with all required amenities.

14. It is the respondent's contention that the allegations by the petitioners regarding the Kenya Railways Corporation are unfounded and mere speculations. That, the petitioners are saboteurs incited by certain politicians to sabotage the development agenda of the current county leadership to prevent it from delivering on its election pledges and as such, this petition is not merited and is just a scheme to undermine the respondent.

15. In essence, the respondent is saying that the alleged violation of the petitioners' constitutional rights is falsehood as the decision to re-locate to the new bus-park was the outcome of necessary consultation with all stakeholders and public participation. That, the petitioners were involved in the consultations and public participation. The respondent is also saying that since the petitioners and indeed all other operators and traders have already moved to the new bus park, this petition has been overtaken by events for issuance of the orders sought herein. Besides, a reversal of the decision would result in loss of property and business for the operators and traders.

16. The foregoing two points are really the key to determining the petition in favour of either party.

To begin with, the contention that the petition has been overtaken by events is far fetched for reasons that a matter touching on fundamental rights, in the opinion of this court, cannot and will never be overtaken by events as that would curtail the Constitutional right to access to justice provided under Article 48 of the Constitution and also encourage public organs to flout the constitutional provisions with impunity knowing too well that by the time the matter reaches court the action complained of would have come to pass and be given legal justification by the phrase “**Overtaken by Events.**”

17. Such occurrence would be tantamount to overthrowing the constitution on the basis of time factor, a technical mechanism which is frowned upon by the same Constitution by dint of Article 159 (2) (a) and under the same Article, the courts in exercising judicial authority shall be guided by other principles such as protecting and promoting the purpose and principles of the constitution (*see, Article 159 (2) (e)*).

18. Constitutional matters are special and of great importance to be tied down to procedures and principles applicable in ordinary civil suits where the phrase “**Overtaken by events**” readily applies in certain circumstances and the concept of time, is of essence.

Let it be remembered that the Constitution is a living legal document supreme over all other legal documents and binds all persons and state organs whose duty it is to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights (*see, Chapter four (4) of the Constitution*) which is the framework for Social, Economic and Cultural Policies. Thus, the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state. For such reason alone, it is difficult to fathom how a constitutional right can be overtaken by events.

19. Under Article 20 of the Constitution, the court in applying the Bill of Rights is required to adopt the interpretation that most favours the enforcement of a right or fundamental freedom and in interpreting the Bill of Rights, the court is required to promote the values that underlie an open and democratic Society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.

In sum, the argument that this petition is overtaken by events is hollow and unsustainable.

20. Coming to the other argument by the respondent that it did not violate the petitioners' fundamental rights and that the petitioners' allegations to that effect are falsehood. The particular rights are those provided Articles 40, 43 and 47 of the constitution. Article 40 provides for protection of right to property. Thus, every person has the right either individually or in association with others, to acquire and own property.

21. The petitioners have not shown how their right under Article 40 was flouted or violated by the respondent especially considering that other than the re-location of their offices and designated parking bays the respondent is not said to have deprived them of their property of any description. The ownership of the land on which the offices and parking bays stand is not or was not vested in the petitioners and if it is vested in another entity such as the Kenya Railways Corporation then, it was for that entity to complain against the respondent and not the petitioners.

22. As regards Article 43 which provides for Socio- Economic rights which include the right to reasonable standards of sanitation, the right to clean and safe water in adequate quantities and the right to social security “**inter-alia**” the petitioners through their learned counsel, **Mr. Waweru**, submitted that the said provision entitled them to protection of their opportunity to earn a living through a legal business thereby guaranteeing their right to social security and to be free from hunger. That, their removal and re-location did not take into account availability of a suitable alternative site, accessibility to the offices from the alternative site, security against criminal activities specially at night and availability of descent sanitary apparatus.

23. The petitioners further submitted that although the respondent is entitled to manage the CBD, their (petitioners) present and future enjoyment of rights and freedom guaranteed by the Constitution cannot be sacrificed at the altar of delivering election pledges and good town planning.

24. The respondent in opposing the petition submitted through the learned counsel, **Prof. Sifuna**, that there was no evidence to support the petitioners' allegations of violation of their Constitutional Rights and in that regard, reliance was placed on the decision in the case of *Anarita Karimi Njeru Vs Rep 1976-1980 KLR 272*, and the case of *Mumo Matemu Vs Trusted Society of Human Rights Alliance & Others [2013] eKLR*.

25. The respondent further submitted that the new bus-park is already operational and has all basic utilities and that the decision to re-locate from the old bus-park was only a temporary measure to allow renovations. That, this was done in good faith and in the public interest to improve the face of the town and for better planning.

26. Basically, socio-economic rights are a second generation human rights as opposed to civil or political rights referred to as first generation rights. These rights are based on the concept that every human being is entitled to live a peaceful, free and happy life. The rights are fundamental, universal and equally important for all human beings and cannot be separated from each other.

27. Socio – economic rights therefore create entitlements to material conditions for human welfare such that a public or state organ must not only refrain from interfering with the enjoyment of such rights but must also act in order to protect, enhance and realize their enjoyment.

A state organ is invariably called upon to respect the enjoyment of such rights and cannot purport to take away or limit peoples' existing access to say clean water, clean environment, proper sanitary facilities etc., without good reason following proper legal procedures.

28. The petitioners have even claimed herein that the respondent's disputed action against them would be an interference to their right to livelihood since they earn a living from their business for which they are licensed. Indeed Article 26 of the Constitution was referred to by the petitioners. It provides for the right to life. In the Indian case of *Olga Tellis Vs Bombay Municipal Corp[1986] A.I.E (sc) 180*, the

court stated that :-

“ Any person who is deprived of his right to, livelihood except

according to just and fair procedure established by law can challenge the deprivation as offending the right to life conferred by Article 21 of the Constitution.”

29. However, it cannot herein be said that the petitioners' right to livelihood was violated by the respondent. This is because the petitioners have not shown how such right was violated or threatened with violation when it was clear that the respondent was only taking the action of re-locating them to a new alternative site without necessarily closing down or taking away their business from which they lawfully earn a living. Their claim in that regard was a long shot and remained unproved by the necessary evidence. As it were, their right to livelihood and hence life remained intact.

30. The bone of contention in the present circumstances is the respondent's action of re-locating the petitioners to a new alternative site and the manner in which it was carried out which according to the petitioners impacted on their fundamental rights to clean and safe water, clean environment and reasonable standard of sanitation.

31. It was not denied by the respondent that the re-location exercise was forcefully effected. In fact, the petitioners were forcefully evicted from the previous designated bus-park and **“herded”** to a new site against their will. They implied that their unwillingness to move to the new site was prompted by the fact that they were not consulted prior to the eviction and that the new site was not suitable to operate their business with human dignity as it lacked basic amenities such as water, lighting and sanitary facilities.

32 The respondent may well have had good reasons to re-locate the petitioners but it was expected to carry out the activity with a humanface and in a dignified manner. Besides, it ought to have provided an alternative site which was friendly in health and environment and suitable for carrying out transport business which affects not only the transport vehicles operators but also the general public who in one way or another eke a living from or depend on the business to go about their daily chores. We are here talking about the small traders usually found in any bus-park all over the country and the travellers who have to commute daily in public service vehicles.

33. Despite the good intention, the respondent ought to have adequately prepared the alternative site and made it conducive for carrying out transport business with special regard being given to socio-economic rights guaranteed by the Constitution prior to re-locating the petitioners and all those who follow their trail in order to live a peaceful, free and happy life.

34 Apparently, the petitioners were moved or to put it more aptly, evicted from the old designated bus-park and forced into an alternative site which was not yet suitable and environmentally sound for carrying out their type of business. Neither was the site healthy enough for carrying out business in a healthy and secure environment. The necessary basic amenities ought to have been in place prior to the forceful re-location of the petitioners to a new alternative site.

35. The respondent cannot therefore be heard to say that the necessary basic facilities have since been provided and that the petitioners are happy with the new site. If indeed the petitioners were happy they would have already reconciled with the respondent and avoided this suit. This petition is a clear demonstration that the petitioners are aggrieved by their re-location to a new site which was devoid of basic amenities and unsuitable for conducting business in a dignified manner.

36. Even if the site was meant to be a temporary one, it was incumbent upon the respondent to recognize and appreciate the petitioners' socio- economic rights by providing all that was required to enable them enjoy those rights hitherto, temporarily.

The memo from the respondent dated 8th April, 2015 (Annexure marked “PM 3” in the replying affidavit) was a clear admission by the respondent that the alternative site was not suitable or ready for

occupation to carry out business as at the time the petitioners were evicted from the old site. Indeed, the site was not fully ready at the time that the memo was written yet the petitioners were already there reluctant and against their wish.

37. On the facts and evidence availed herein, the petitioners have proved and satisfied this court that the respondent's action of re-locating them to a new alternative bus-park was in violation of their socio-economic rights, guaranteed by Article 43 of the Constitution. Things would not have gotten out of hand if the respondent had well directed policies and programmes for implementing decisions touching on fundamental rights of the citizens. In this case, the respondent evicted the petitioners in a huff and after leading them to believe that such action would not be arbitrary and would be carried out in an organized and systematic manner.

38. The action was to say the least undertaken in a manner which was arbitrary, capricious and high handed thereby resulting in an express contravention of the Constitution. It is not enough that the respondent made attempts to provide basic amenities at the new site after the re-location. What was done later ought to have been done prior to the re-location. It came too late in the day such that it amounted to a gimmick or window dressing to cover for the respondent's deliberate transgression of the petitioners' fundamental rights. It did not help that the exercise was carried out in a most uncivilized manner of forcefully evicting and relocating people.

39. The courts being vanguard of the Constitution cannot allow or permit any public or state organ to violate fundamental rights guaranteed by the Constitution with utmost abandon and impunity and in particular, the socio-economic rights under Article 43 of the Constitution and the right to fair administrative action under Article 47 which provides that every person has the right to administrative action that is expeditious, efficient, lawful. Reasonable and procedurally fair.

40. Public participation in the decision making process of a public body is a component of fair administrative action and so is the right to be heard before any drastic decision is taken or implemented. The petitioners referred to three meetings held with the respondent in the month of January 2015, to deliberate on the proposed relocation of the designated bus-park. The respondent referred to one meeting and produced an attendance list (see, Annexure marked 'PMI' in the replying affidavit) which does not bear the date or the agenda of the meeting.

41. Neither the petitioners nor the respondent produced minutes of any of the alleged meeting but what is certain is that there was some form of public participation and Consultation with stakeholders in the period preceding the disputed re-location. It is not however, clear whether the outcome of the meetings was the decision to re-locate the petitioners by forceful eviction from the old bus-park. Most likely than not no concrete agreement was reached thereby rendering the public participation and consultation meaningless for purpose of a fair administrative action.

42. The notice issued by the respondent dated 23rd March 2015, culminated in the drastic action that followed against the respondent but it was vague as it was not addressed specifically to the petitioners. It was a general notice which did not even give the affected people a reasonable period of time within which to re-locate.

43. In essence, the petitioners were condemned unheard as it cannot be said that the notice issued on that 23rd march 2015, was as a result of wide consultations with stakeholders. In any event, the petitioners were entitled to a reasonable period of time to comply with the notice if it was as a result of a consensus between them and the respondent. Their plight was worsened by the fact that the proposed new or alternative site was not even ready for occupation at the time the notice was issued. This meant that the respondent proceeded to effect the notice prior to providing a suitable alternative site for the petitioners.

44. The lack of suitable site could well be said to have been lack of alternative site.

Therefore, the petitioners had nowhere to move. It was quite in order for them to remain "*in situ*" at the old bus-park until a suitable alternative site was provided and thereby protect their socio-economic

rights.

45. In so far as the notice was vague, extremely short and not in particular or specifically addressed to the petitioners, it was unreasonable and unfair to amount to any meaningful notice in enforcing an administrative action. It was thus issued without due regard to the provisions of Article 47 of the Constitution thereby violating the petitioners right to fair administrative action.

46. From all the foregoing, it is the holding of this court that the respondents action to forcefully evict the petitioners and purport to re-locate them to a non existent alternative site was a gross violation of the petitioners fundamental rights and freedom guaranteed by Articles 43 and 47 of the constitution.

47. It is stipulated in the very Constitution that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realizations of the potential of all human being (see, Article 19(2)).

Among the national values and principles of governance which bind all state organs and their offices include the rule of law, participation of the people, human dignity, equity, social justice, inclusiveness, equality and human rights (see, Article 10 of the Constitution)

48. It was obvious that the respondent disregarded the foregoing Constitutional Principles and values and acted rather drastically against the petitioners and with the knowledge that every proven violation of fundamental rights and freedom would attract a remedy for the aggrieved.

49. Under Article 23 (3) of the Constitution, a court may grant appropriate relief including, a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation and an order of judicial review.

50. The Petitioners are herein praying for declaratory and injunctive orders which they are indeed entitled to and are hereby granted to the effect that the respondent action of evicting or removing the petitioners from the old designated bus-park and purporting to relocate them to new alternative site was in gross violation of their constitutional rights under Articles 43 and 47 of the Constitution.

51. Further, an order of injunction, is hereby issued against the respondent restraining it, its officers, agents, servants / employees or otherwise from evicting or removing the petitioners from the old designated bus- park until such time that a suitable alternative site shall be provided or until such time that meaningful, proper and complete consultations and / or agreements on the proposed re-location between the respondent and the petitioners and indeed all stakeholders shall be achieved.

The “Status – quo” existing between the petitioners and the respondent prior to the date of the invalidated notice i.e 23rd March 2015, is hereby restored. The petitioners are entitled to the costs of the petition.

J. R. KARANJA

JUDGE

Delivered and Signed this 11th day of June 2015

In the presence of Mr. Ingosi for Mr Waweru & Prof. Sifuna

11.6.2015

Before J. R. Karanja - Judge

Court Clerk - Emily

Mr. Ingosi holding brief for Mr. Waweru for Petitioners

Prof. Sifuna for Respondent

Prof. Sifuna

Given that the ruling may affect many people other than the petitioners, we would on constitution grounds apply for a stay of execution for thirty (30) days to enable consultation, and / or appeal.

J. R. KARANJA

JUDGE

Mr. Ingosi

A declaration has already been made. Granting stay means that the court is perpetrating violation of the Constitution.

Prof. Sifuna

Rule 32 (2) of the Mutunga Rules applies in the Constitution.

Court

The oral application for stay is disallowed. The respondent is at liberty to appeal. A formal application may be made as provided for under the Mutunga Rules.

J. R. KARANJA

JUDGE