



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CONSTITUTIONAL PETITION CASE NO.23 OF 2014**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT, NO.17 OF 2012**

**AND**

**IN THE MATTER OF: SECTIONS 102, 103, 115 & 116 OF THE COUNTY GOVERNMENT ACT, NO.17 OF 2012**

**BETWEEN**

**DR. JOHN OURU NYAEGA.....1<sup>ST</sup> PETITIONER**

**ANDREW MONARI AUGUSTINO.....2<sup>ND</sup> PETITIONER**

**NAFTAL ABASI ONDIEKI.....3<sup>RD</sup> PETITIONER**

**ANDREW KERAMA BOTA.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF NYAMIRA.....1<sup>ST</sup> RESPONDENT**

**THE EXECUTIVE COMMITTEE MEMBER OF TRADE**

**AND INDUSTRY, COUNTY GOVERNMENT OF NYAMIRA.....2<sup>ND</sup> RESPONDENT**

**THE KIOSKS ALLOCATION COMMITTEE, EKERENYO MARKET.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The background of this matter began vide a letter dated 8<sup>th</sup> October 2013 when the County Secretary of the County Government of Nyamira acting on instructions from the governor constituted a committee to oversee the allocation of Ekerenyo Bus Park, kiosks. Thereafter, the committee select constituted of Francis Mbeche, Charles Kerongo, Hon. Thaddeus Nyabano Momanyi, Hon. Samuel Nyang'au Nyanchama, Hon. Fred Nyachae Omayo, Chief Philip Masengo, Chief John Rioki, Stephen Nyangau and

Alice Oyioka. After the committee executed its task of allocating at Ekerenya Market, the petitioners on being dissatisfied with the manner in which the above committee concluded its task rushed to court seeking for an order that:

**‘Pending the hearing and determination of the petition the Respondents their agents, servants or employees or any other persons authorized by them if acting under their instructions be restrained from entering into, putting into possessions for business or allowing any persons to operate business from or opening up the stalls or kiosks at Ekerenyo market to members of the public.’**

The Honourable Lady Justice Ruth Sitati upon consideration of the application foresaid *ex parte* granted an order that the kiosks (*stalls*) at Ekerenyo market be preserved from possession and use by all persons pending further orders of the court.

When the foresaid application came up for further hearing it was agreed by consent that the interim orders foresaid be extended to last the hearing of this matter and that the application and petition be heard together.

The petitioners herein Dr. John Ouni Nyaegah, Andrew Monari Agostino, Naftali Abasi Ondieki and Andrew Kerama Boba filed a petition under **Article 16, 27 and 47** of the **Constitution of Kenya 2010** and **Sections 102, 103, 115 and 116** of the County **Government Act 2012** seeking:

- a. **A declaration be made that the Constitution of the 3<sup>rd</sup> respondent, the processes and procedures adopted by the 3<sup>rd</sup> respondent in the allocation of kiosks and the allocation of kiosks are unconstitutionally null and void.**
- b. **The petitioners pray for an order of mandamus compelling the respondents to embrace the value and principles of governance as constitutionally enacted to appoint a people driven committee to allocate kiosks according to a published and known criteria.**
- c. **Costs of the petition.**
- d. **Any other relief that the Honourable court may deem just and expedient to grant.**

The facts of the petition are that through a letter dated 5<sup>th</sup> October 2013 referenced **HCG/MKTS/1/72** the County secretary of the 1<sup>st</sup> respondent wrote to Mr. Francis Mbeche, Mr. Charles Kerongo, Hon. Thaddeus Nyaboro Momanyi (Ekerenyo ward), Hon. Samuel Nyangau Nyanchama (Itibo ward), Hon. Fred Nyachae Omaiyo (Magwagwa ward), Chief Philip Masengo (Bukerati location), Chief John Rioti (Obwari location), Mr. Stephen Nyangau chairman (Ekerenyo Market) and Mrs. Alice Oyioka Social Services constituting and informing them of their appointment as the committee to oversee the allocation of kiosks. That according to the letter fore-alluded at paragraph 5 the 3<sup>rd</sup> respondent was supposed to hold its first meeting on the 11<sup>th</sup> day of October 2013 at the Governor’s Board room and present a final and full report on their meetings to the appointing authority within 14 days from the date of their first meeting.

That the 3<sup>rd</sup> respondent’s members were advised in their appointment letters while undertaking their mandate to ensure that the kiosks are allocated fairly and that factors like gender, disability and marginalized groups were considered. Also they were advised to embrace inductiveness on the issue of allocation of kiosks. However, the petitioners have now contended that there was no embracing of the national principles and values of government set out at **article 10** of the **Constitution of Kenya 2010** more particularly participation of the people, inductiveness, non-discrimination, protection of the marginalized, transparency and accountability in the allocation of kiosks under that mandate of the 3<sup>rd</sup> respondent.

The petitioners now contend that as from mid June 2014 they received information that the ‘*successful*’

applicants have been allocated kiosks and are being informed of the allocations through mobile phone short text messages. Moreover, that the 'successful' applicants for kiosk allocations have been seen taking up possession of the various kiosks and carrying out various renovations therein to fit their choices of business. Hence according to the petitioners, the exercise of allocation of kiosks to various persons who applied for kiosks at Ekerenyo market has therefore not been fair, accountable, inclusive, non-discriminative, transparent or considerate of gender disability and marginalized groups.

As a result thereof, the petitioners now contend that the allocation of kiosks at the Ekerenyo Market was unconstitutional, fraudulent, skewed and discreet hence persons who contributed some of the land where Ekerenya Market is situated and who have perennially owned kiosks and run businesses at the market have been deprived of their rights. The petitioners have also contended that the kiosk allocation has been used politically to reward the henchmen of the politicians who form part of the committee or are acting at the behest of other politicians.

Lastly, the petitioners contend that allocation of kiosks strictly as by law established would benefit them and others. He thus urged the court to exercise its judicial authority as donated by them to protect their rights that accrue from the constitutional provisions.

The respondent on their part filed a Memorandum of Appearance dated 17<sup>th</sup> July 2014. In a replying affidavit sworn by Jones Moko Omwenga, the Executive Committee member in-charge of trade and industry docket at the County Government of Nyamira dated 15<sup>th</sup> July 2014, he has deponed that the 1<sup>st</sup> respondent, 3<sup>rd</sup> respondent and himself have at all material times carried out their respective functions and obligations guided by the constitutional principles. That the 3<sup>rd</sup> respondent was not a legal person capable of being implicated in and that the petitioner's petition is too vague and general.

He further admitted that indeed a committee was constituted to oversee the allocation of stalls at the newly constructed Ekerenyo market. He outlined the members of the committee as follows:

- |                             |   |                         |
|-----------------------------|---|-------------------------|
| a. Francis Mbeche           | - | Town Administrator      |
| b. Charles N. Kerongo       | - | C.P.D.O                 |
| c. Wilfred Ombati           | - | Chief                   |
| d. Alice Oyieko             | - | DSDO                    |
| e. Samuel Nyang'au          | - | Chair, Ekerenyo Market. |
| f. John N. Rioki            | - | Chief Obwari Location   |
| g. Fred Nyachae             | - | MCA Magwagwa ward       |
| h. Thaddeus Nyaboro Momanyi | - | MCA Ekerenyo            |

He contended that all the petitioners hail from Ekerenyo and Itibo wards and their members of the County assembly were also members of the committee *i.e.* Thaddeus Nyaboro Momanyi and Samuel Nyangau Nyanchama respectively. The members were included to undertake their mandate with due regard to the provisions of the constitution and to evidence this fact, the minutes of the committee meetings of 11<sup>th</sup> October 2013 and 26<sup>th</sup> November 2013 marked No.2 and 3 were attached to evidence the fact that in the said meetings:-

- 1. The committee was alive of the provisions of Articles 2, 3, 10, 27, 47, 34, 35 and 56 of the Constitution of Kenya.**
- 2. The committee appreciated the essence of devolution reason why they were placing insistence on organized groups.**
- 3. The committee was aware that public participation in the matter was necessary and mandatory.**

He thus contended that consideration was given in favour of applicants from Ekerenyo ward and its immediate surrounding wards, and, in allocating the said stalls the 3<sup>rd</sup> respondent was premised on the

knowledge that there already existed County owned stalls within other wards which stalls benefit persons who hail there from and the immediate surroundings wards. Hence he contended that the most reasonable and legal considerations by the committee in picking on the successful application were agreed on to be the following:

1. **The wards where the applicants came from not clan.**
2. **Gender**
3. **Whether the applicant hailed from a minority or marginalized group**
4. **Whether the applicant was a person with a disability.**
5. **Whether the applicant was a youth.**

Hence he contended that upon the aforementioned criteria that the stalls were allocated, and according to him the applicants from Ekerenyo Ward actually took a lion's share of 21 out of the 43 stalls. Also that the physically challenged applicants were beneficiaries of the stalls *i.e.* stall 1 and 40, three stalls were used as offices therefore leaving a total of 43 stalls for allocation, out of the 43 stalls thirteen (13) were allocated to women, stall number seventeen (17) was used to serve as a ladies toilet, stall number 26 and 45 were allocated to a widow and a youth who is a total orphan and stall number 21 was allocated to an applicant from a minority group (Luo).

In addition to this, he contended the members of the public were invited to apply for the kiosks (stalls) through a newspaper advertisement and distribution of posters. Furthermore, that they were constrained to advertise through the newspaper for a second time when it dawned on them that organized groups had not applied and the number of applicants was limited. Therefore he averred that contrary to what is alleged in the petition, the verifying affidavit thereof and the affidavit in support of the notice of motion, they organized a forum for public participation on the 24<sup>th</sup> March 2014 at Ekerenyo grounds and from the various represented groups they had about 150-200 attendants and owing to the number of the available stalls it was and is not humanly possible to satisfy everybody.

Lastly, he contended that both the petitioners' petition and application should be dismissed with costs. The petitioners on their part have also replied to the above affidavit sworn by the respondents averring that:-

1. The replying affidavit is defective and incompetent as it does not state the deponent address and place of residence on the kiosks allocation committee of Ekerenyo Market that was appointed and constituted by the Governor of Nyamira he observed and stated that:-
  - i. **The committee did not meet the gender rule set out in the constitution of Kenya 2010. The committee comprising of nine members has only one female member. The committee is therefore unconstitutional and any deliberations carried out and recommendations made by it are null and void.**
    - ii) **The committee was not gazette as required either in the official Kenya gazette or county gazette.**
    - iii) **Annexure TON (a) is an affidavit sworn by one of the committee members in which he clearly states that though he was appointed he has never received any copy of the letter of appointment.**
    - iv) **That at paragraph 10 of the replying affidavit of Jones Moko Omwenga sworn on the 18<sup>th</sup> July 2014. One Wilfred Ombati (chief) is named as one of the committee members yet he is not named in the letter of appointments fore-alluded. It is not clear how he was appointed to the committee. He clearly had no mandate to sit in the committee.**
2. He also contended that the respondents have not annexed anything in the nature of how the members of the public were informed and what criteria was used to identify the persons who were

allocated kiosks , thus the respondents did not follow the values and principles set out under the constitution and other enabling laws in allocating kiosks.

3. That the respondents have deliberately failed/refused to annex a copy of the persons to whom the kiosks were allocated and the reason for such allocation, the clans to which they belong and/or any other consideration that may have been used in determining them as the allocation beneficiaries.
4. In reference to JMO-5 he stated that the document did not measure to an advertisement as it was an office generated notice which did not state how it was relayed to the members of the public on promulgated as an advertisement would ordinarily have as it contents the newspaper that relayed it to the public and date inter alia,
5. In reference to JMO-6 he stated that the minutes are made up for the purposes of this case thus it does not demonstrate how members of the public were notified and invited to the meeting. Hence, the minutes are deficient and not replete without evidence of how members of the public were invited and contended that it was common knowledge that a meeting cannot be held without a prior invitation to those who are to attend it.
6. He thus contends that the respondents replying affidavit did not demonstrate that there was public participation and adherence to the prescribed values and principles and therefore it would be in the interests of justice and fair play that the kiosks allocation exercise and occupation thereof be halted to await the adherence to the prescribed values, principles and procedures.

When the matter came before Hon. Sitati J, it was agreed that the above petition be argued by way of written submissions. Both submissions have now been filed.

## **SUBMISSIONS**

The petitioners in their submissions have taken issue with the fact that the respondents have not demonstrate that in allocating kiosks within Ekerenyo Bus Park they allowed members of the public to participate as required. That the document annexed to the replying affidavit of Jones Moko Omwenga does not show that the requirement of public participation was at all met and what is annexed as an advertisement does not contain the dates when the alleged advertisement was put up or the newspaper of County or national circulation that carried the advertisement.

He referred to **Section 87** of the **County Government's Act** where a threshold is set for citizen participation. Also, the petitioner has taken issue with the fact that the committee for allocation of kiosks does not meet the principles of devolved government set out at **Article 175** of the **Constitution of Kenya** notably the Committee does not meet the gender rule.

The respondents in their submissions have laid out 6 issues of determination which are:-

- **Whether the petition is vague**
- **Whether the third respondent is capable of being sued**
- **Whether the process and procedures adopted by the 3<sup>rd</sup> respondent in the allocation of the kiosks were unconstitutional thus null and void.**
- **Whether the respondents embraced the values and principles of governance as constitutionally enacted to appoint a people driven committee to allocate kiosks according to a published and known criteria.**
- **Whether the court can grant orders of mandamus as prayed.**
- **Who is entitled to costs of petitions?**

On the issue as to whether the petition is vague, the respondents submitted that the petitioner's petition does not appreciate the jurisprudence of constitutional petition and thus it does not disclose the fundamental breaches as alleged neither does it show the notations and as much it cannot stand. The respondent referred to **John Mining Temoi & another v. Governor of Bungoma County & 17 others**

where Mabeya J, opined:

**‘.....as a basic minimum, the petitioners are required to not only are the provisions of the constitution which have been violated but also the manner in which they have been violated with regard to them in demonstrating the manner in which there has been a violation of their rights or of the constitution, the petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.’**

On whether the third respondent is capable of being sued the respondent contended that the 3<sup>rd</sup> respondent is not capable in law to be sued in its name and capacity as a committee the respondent relied on **CT Bolts (PVT) Ltd v Workers Committee** where the Supreme Court of Zimbabwe held that ‘*.....under the common law an unincorporated association like the 3<sup>rd</sup> respondent has no legal personal*’

On whether the process and procedures adopted by the 3<sup>rd</sup> respondent in the allocation of the kiosks were unconstitutional, the respondents submitted that their action was within the precincts of the constitution and proved it as follows:

Under **article 10** of the **Constitution** the respondents submitted that there was public participation of the people in the whole process from advertising to the allocation and referred to paragraph 28 of the replying affidavit and annexure ‘JMO-6’.

Under **article 27** of the **Constitution** which provides for equality and freedom from discrimination the respondents referred to JMO-4 which is a tabulation of the successful applicants who were to get the stalls and he submitted that on looking at the same out of the 43 stalls, Ekerenyo Ward took 21 stalls, persons with disability got two stalls (**stall number 1 & 40**) thirteen stalls allocated to women, minorities and youths were also allocated stall, a widow and an orphan were also allocated stalls.

Whether the respondents embraced the values and principles of governance as constitutionally enacted to appoint a people driven committee to allocate kiosks according to a published and known criteria.

The respondents submitted that the composition of the committee was not a subject of the petition as the petition only dealt with the allocation of the kiosks. That notwithstanding the respondents acknowledgement that having one woman in the committee was not good enough and did not match up the expectations of the constitution in so far as **Article 27(a)** is concerned, but however they referred to the Supreme Court of Kenya Advisory Opinion on the third gender rule where the supreme court advised that in so far as the two-thirds gender rule was concerned its enactment was to be progressive.

Of whether the court can grant orders of mandamus as prayed.

The respondent has submitted that the court cannot grant orders of mandamus as prayed in the petition by stating that an order of mandamus is an order directing a public authority, person in a tribunal exercising its public duty to exercise that function or duty if it has not been done that in this case the respondents have carried out the duty and the only order of judicial review that ought to have been sought is that of certiorari. He relied on **Kenya National Examination Council v. Republic exparte Geoffrey Gathenji Njoroge & others Court of Appeal No.266 of 1996 at page 204.**

Of who is entitled to costs of this petition?

The respondents submitted that they (*respondents*) were entitled to costs of both the petition and application being that the petition and application there from were not only vague but politically motivated and as such, it was an abuse of the court process.

**DETERMINATION**

Having carefully perused the petition, the affidavits and the parties submissions, the following issues are for determination namely:

- a. **Whether the petition is vague**
  - b. **Whether the process and procedures adopted by the 3<sup>rd</sup> respondents in the allocation of the kiosks were unconstitutional thus null and void.**
  - c. **Whether the committee appointed by the 3<sup>rd</sup> respondent took into due regard the gender principle.**
  - d. **Whether this court can grant orders of mandamus as prayed.**
1. In **Javan Oscar Bulemi (suing as secretary general Tiriki Union (E.A) v Permanent Secretary, Ministry of Internal Security and Principal Administration & 2 others [2015] eKLR** court observed:

**“The manner in which constitutional petitions are to be drafted has also severally been dealt with by our courts. In the late 1970’s the High Court dealt with this issue in the case of Anarita Karimi Nyeri vs The Republic [1976-1980] KLR 72 and came up with the following precise principle in dealing with constitutional petitions it is now required of a petitioner to:**

- I. **Specifically set out the provisions in the constitution that have been allegedly violated**
- II. **Provide the particulars of the alleged violations**
- III. **Provide particulars in which the respondents have purportedly infringed their rights.”**

Similarly Hon. Lenaola J, in the case of **Stephen Nyarangi Onsoma & Another vs George Magota & 7 others [2014] eKLR** in revisiting the principles in Anarita Karimi’s case said as follows:

**‘...this court has in the past expressed its concern about the manner in which parties coming before the court and alleging a violation of constitutional rights have prescribed their cases. As a basic minimum a petitioner is required to cite the provisions of the constitution which have allegedly been violated and the remedy which he seeks for the violation. In demonstration the manner in which they have been violated, a petitioner should present before the court evidence of the actual basis upon which the court can make a determination whether or not there has been a violation.’**

Indeed the need of precise pleadings in constitutional petitions was re-emphasized in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** as under:

**‘We cannot but emphasize the importance of the precise claims in due process, substantive justice and the exercise of jurisdiction by a court in essence, the due process, substantive justice and the exercise of jurisdiction are of a function of precise legal and factual claims.’**

In the instant petition, the petitioners have stated in their petition that the manner in which the committee composed of the respondents made allocation of kiosks in Ekerenyo market was unfair and discriminatory. However as correctly submitted by learned counsel for the respondents, the petitioners have failed to demonstrate how the said allocation of kiosks was done unfairly. By this I mean that apart from the allegations of unfairness the petitioners needed to present evidence before this court who was affected by the said allocation of kiosks discriminatory by annexing affidavits of such persons who had donated their pieces of land for the building of Ekerenyo market and were not given market space in the said Ekerenyo market.

2. **Whether the process and proceedings adopted by the 3<sup>rd</sup> respondents in the allocation of the kiosks were unconstitutional thus null and void.**

The petitioners have throughout their petition stated that the respondent did not involve the public *i.e.* citizens of Nyamira County in the decisions to they reached in whom to award the kiosks in Ekerenyo Market. **Article 10 of the Constitution** vouches for public participation, among other principles, under our national values and principles of governance as follows:

1. The national values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them.
  - a. **Applies or interprets this constitution**
  - b. **Enacts, applies or interprets any law;**
  - c. **or makes or implements public policy decisions.**
2. The national values and principles of governance include;
  - a. **Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
  - b. **Human dignity, equity, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalized;**
  - c. **A good governance, integrity, transparency and accountability and**
  - d. **Sustainable development.**

In Jovan Oscar (*supra*) the observed:

**Article 10 of the constitution is clear that it binds all state organs, state officers, public officers and all persons in the discharge of public funding. However the constitution does not provide for how public participation is to be undertaken. That process is therefore left to those encompassed under Article 10 to see how to undertake the same. This prevailing situation therefore calls for a national registration on public participation so as to generally guide the process given that some registration has already partly embraced the principle including under Sections 87 and 115 of the County Government Act, 2012 and several other legislations passed by the County Government in the county.**

In the **Namibian case of S. v. Acheson 1991(2) SA 805 (HM HC)** at 813 Mohammed, Ag. JA, expressed himself as follows:-

**‘the constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and the terms of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.’**

So, what exactly amounts to public participation: This principle was well dealt by Odinga J, in the case of **Robert N. Gakuru & others v. Governor Kiambu County & 3 others [2014] eKLR** where the judge extensively and in a comparative analysis (*with other jurisdictions especially South Africa*) clearly brought out the essence of the principle of public participation. At paragraph 5 thereof the judge stated as follows:-

**‘The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to note and/be**

**elected into the public office the general right to participate in the conduct of public affairs include engaging in public debate and dialogue representatives at public hearing. But that is not all, it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.**

**The very first provision of our constitution democracy, includes as part of these values a multi-party system of democratic government to ensure accountability, responsiveness and openness commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated it is apparent from the pre-amble of the constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law making process....'**

After looking at the petitioner's petition and documents attached to the respondent's replying affidavit it is undisputed that:

- Annexure JNO-6 indicated that there was a public participation forum which has not been controverted in any manner by the petitioners since no proof was furnished by them (petitioners) showing otherwise. As the minutes of the public meeting held at Ekerenyo market grounds the speakers included:- Ekerenyo market chairman, a representative from the disabled, representative from the youth, women representative, matatu association representative, Jua kali association among others. It is also undisputed that each representative championed the rights of their people way before stalls were allocated and this shows diversity in so far as the public participation was incorrect.

Furthermore, the respondents have annexed JNO-5 which shows that even before the committee held a public forum the process of advertisement calling for applications for those who wanted the stalls was through newspaper advertisement and distribution of posters.

- The respondents also attached JNO-4 which was a tabulation of the successful applicants who were to get the stalls and doing quick mathematics the same indicates that out of the 43 stalls Ekerenyo ward took 21 stalls persons with disability got two stalls (1 & 40) thirteen stalls were allocated to women minorities and youths were also allocated a stall. A widow and an orphan were also allocated stalls. Therefore in my humble view, all the above evidence by the respondents clearly shows that there was participation by the citizens of Nyamira in awarding the stalls in Ekerenyo market.

**3. On whether 1<sup>st</sup> respondent took into due regard the gender principle in appointing the committee members.**

It is undisputed that the respondents committee was composed of 1 woman and 6 men. The respondents themselves have admitted that that was an oversight on their part and even cited the Supreme Court of Kenya Advisory Opinion on two – thirds gender rule. It must be noted that by the time the said committee was being constituted, the County government concept was fairly new and therefore such errors were most often than not bound to take place. However taking into due regard that the 1<sup>st</sup> respondents committee at least composed of one woman I am persuaded by the counsel's submission that in so far as the gender rule was concerned, its enactment is progressive.

**4. On whether the court can grant orders of mandamus as prayed:-**

**In Kenya National Examinations Council v. Republic Exparte Geoffrey Gathenjo Njoroge & others Court of Appeal Civil Appeal No.266 of 1996 (unreported)**

**‘where the court held that an order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law then mandamus is a wrong remedy to apply for because an order for mandamus cannot quash what has already been done. Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction.**

Having clearly analyzed the above petition by the petitioners, I hold that same lacks in merit and I hereby dismiss the same. I award costs of the petition and the Notice of Motion to the respondents.

**Dated, signed and delivered at Kisii this 17<sup>th</sup> day of July, 2015**

**HON. C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

M/S Muguche holding brief for Ogutu for the Petitioners

M/S Okwoyo holding brief for Ocharo for the Respondents

Mr. Samuel Omuga: Court clerk