



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
PETITION NO. 58 OF 2011

VERONICA NJERI WAWERU.....1<sup>ST</sup>  
PETITIONER

HELLEN WANGUI.....2<sup>ND</sup>  
PETITIONER

LUKA MOSES MABEYA.....3<sup>RD</sup>  
PETITIONER

STEPHEN MAINA NJOMO.....4<sup>TH</sup>  
PETITIONER

BEATRICE WANJIRU GATEHENYA.....5<sup>TH</sup>  
PETITIONER

AND

THE CITY COUNCIL OF NAIROBI.....1<sup>ST</sup>  
RESPONDENT

THE MINISTER FOR INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION.....2<sup>ND</sup>  
RESPONDENT

THE MINISTER OF LANDS.....3<sup>RD</sup>  
RESPONDENT

JUDGMENT

**Introduction**

1. The petitioners have brought this petition alleging violation of their rights under Articles 47 and 24 of the constitution.
2. The petition dated 5<sup>th</sup> April, 2011 and filed in court on the same day seeks the following orders:
  - (a) A declaration be and is hereby issued that undated notice to vacate by the City Council of Nairobi purportedly served on the Petitioners on 11<sup>th</sup> March, 2011 violates the petitioners fundamental rights under Article 47 of the Constitution of Kenya.

(b) A declaration be and is hereby issued that the undated notice by the City Council of Nairobi purportedly served on the Petitioners on 11<sup>th</sup> March, 2011 infringes on the Petitioners rights guaranteed under Article 24 of the Constitution of Kenya.

(c) An order of permanent injunction do issue restraining the Respondents either by themselves, and/or whomsoever claiming through them from evicting the Petitioners from the road reserve adjacent to L.R. 13620 Nairobi without offering an alternative for the settlement and economic productivity of the Petitioners.

(d) An order of payment or general, exemplary and punitive damages by Respondents to the Petitioners as shall be assessed by this Honourable Court.

(e) The Respondents do pay for the costs of this Petition.

3. The petition is supported by the affidavit of Helen Wangui sworn on 15<sup>th</sup> April, 2011. A further affidavit also sworn by Helen Wangui on 26<sup>th</sup> October 2011 was filed in support of the petition.

4. The petition is opposed by the respondents. The 1<sup>st</sup> respondent oppose the petition on the following grounds:-

1. **THAT** the petition does not raise any constitutional issue.

2. **THAT** the Petitioners have not acquired a proprietary interest envisaged in Article 40 of the Constitution.

3. **THAT** the subject land lies within and ownership is vested in the City Council of Nairobi to hold in trust and administer the same for the good of the people of the City of Nairobi.

4. **THAT** the same is administered by the Commissioner of Lands on behalf of the City Council of Nairobi or by the latter itself as provided for in the Trust Land Act Chapter 288 Laws of Kenya.

5. **THAT** the fees referred to in the business permit are in respect of business and not the fees for a licence in the land envisaged in the Trust Land Act.

6. **THAT** in any event, even the licence fees referred to in the Trust for Land Act are temporary, can be cancelled and do not confer on the licence a proprietary interest envisaged in the constitution.

7. **THAT** the petitioners were duly notified.

A replying affidavit sworn by **Chrispine Caleb Otieno** on 22<sup>nd</sup> August, 2011 was filed on behalf of the 2<sup>nd</sup> respondent.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the petition on the grounds of opposition that:-

1. The application as drawn and filed is incompetent, offends the law and is un-procedural.

2. That the application is made in bad faith and is misconceived.

3. That constitutional rights are enjoyed independently and individually and thus this suit lacks form and substance by the petitioners canvassing a denial and/or derivational of various constitutional rights collectively.

4. That the defendants fall short of the prima facie display of a denial of an inherent right and are merely hoodwinking the court by indicating that they have a right to occupy and use the suit parcel.

5. That a constitutional violation of a right must be specific in nature and the particular article violated identified issue which the applicants fall short of.
6. That the suit dispute is land ownership of user and occupation and not a denial of an inherent right on deprivation of ownership.
7. That the application is mischievous, an abuse of the due process of court founded on conjecture and allegations that cannot be proved.
8. That the applicant's contention of a legitimate interest in the suit property need to be proved via viva voce evidence in a full trial (and not via a petition)
9. The Petitioners admit that they have been residing on a road reserve and consequently have no claim to the land.
10. That the petitioner's main interest is to legitimatise their stay on the suit parcel of land via the stay orders obtained since they lack any registrable instrument.
11. That the application is without merit and frivolous.

6. The petitioner filed written submissions and authorities dated 26<sup>th</sup> October 2011 while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> filed their submissions and authorities dated 22<sup>nd</sup> August and 10<sup>th</sup> November 2011 respectively.

7. When the matter came up for hearing on the 14<sup>th</sup> of December 2011, Mr. Begi, Counsel for the petitioners indicated that he did not wish to highlight his submissions as he would be repeating himself but would rely entirely on the submissions as filed. Mr. Wati for the 1<sup>st</sup> respondent and Mr. Wachira for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents highlighted their submissions before me on 14<sup>th</sup> December 2011 to which Mr. Begi then responded.

### **The Petitioners' Case**

8. The petitioners' case is that they have been operating businesses ranging from timber yards, garages and hardware shops for over ten years in the suit property, which they acknowledge is public land, a road reserve adjacent to L.R. No. 13620 within Kasarani in Nairobi.

9. They claim that they have been harassed by the Provincial Administration Kasarani with a view to forcing them to vacate the premises which are adjacent to property belonging to the Provincial Administration. They have annexed to the affidavit notices received from the 2<sup>nd</sup> respondent dated 15<sup>th</sup> May 2008 requiring them to vacate the premises.

10. The petitioners state that in March, 2011, they received undated notices from the 1<sup>st</sup> respondent requiring them to vacate the subject premises. They argue that the notices did not specify the reason they were required to vacate the suit premises.

11. The petitioners allege that they have licences to operate businesses from the 1<sup>st</sup> respondent. They have invested millions of shillings in their businesses, and they have a legitimate expectation that having been licensed by the 1<sup>st</sup> respondent for the year 2011 and paid revenue, they deserve protection of the law.

12. They claim that the notices to vacate issued by the 1<sup>st</sup> respondent threaten their rights under Article 40 of the Constitution. They argue also that the notice given to them is too short and the respondents have not accorded them an alternative site from which to conduct their business thus violating their right under Article 43 of the constitution.

13. The petitioners also allege violation of their right to fair administrative action as provided under Article 47 of the Constitution. They state that back in 2008, they wrote to the Minister of Lands seeking a hearing on the matter of the Provincial Administration land adjacent to their business premises when they had been served with notice that the Provincial Administration wished to build a provincial office on the land but were not accorded an opportunity to be heard.

14. The petitioners rely on the ruling by Justice Musinga in the case of ***Susan Waithera Kariuki and Others –v- Town Clerk Nairobi City Council and 2 Others Petition No. 66 of 2011*** to support their case.

15. They urge the court to find that the petition succeeds and award them costs.

### **The 1<sup>st</sup> Respondent's Case**

16. The 1<sup>st</sup> respondent's case as presented by Mr. Wati is set out in the replying affidavit dated 22<sup>nd</sup> August, 2011 sworn by **Chrispine Caleb Otieno** and the written submissions and authorities filed in the same the same bundle.

17. Mr. Wati referred the court to the decision of the Court of Appeal in the case of ***Rashid Odhiambo Alogo & 245 others -vs- Haco Industries Ltd Civil Appeal No. 110 of 2001*** in which the court set out the guidelines on how to resolve a constitutional petition. He submitted that the court should consider whether or not the allegations made by the petitioner are true and submitted that this petition failed on that point alone. While the reliefs sought in the petition show that the petitioners are alleging violation of Article 47 and 24, they were alleging violation of Articles 40 and 43 of the Constitution in the body of the petition.

18. He argued that there are no facts in the petition to show that the petitioners have a right to the property which they could be deprived of under Article 40. The petitioners had admitted at paragraph 1, 2 and 7 of the petition that they have no title deed to the land and that it is a road reserve within the municipality of Nairobi.

19. Mr. Wati submitted that for the petitioners to own land in Nairobi, they had to do so in accordance with the procedure set out in the Trust Land Act, Cap 288 Laws of Kenya. Under this Act, one could have either a licence or a lease. He referred to ***N. Ikiara M' Kanya & Another -v- Gilbert Mbijiwe Civil Appeal No. 13 of 1980*** with regard to the procedure for acquiring trust land. In the absence of a lease or a licence, the petitioners have no private interests in the land which they could be deprived of. They had stated that the land they were occupying is a road reserve for public use and is not available for alienation for private use.

20. Mr. Wati submitted further that Article 47 on fair administrative procedures where 43 is on social consumer rights. Article 24 set out in the reliefs section is about limitation of rights and does not confer any right capable of being deprived. There were no facts before the court therefore to show that the petitioners had been deprived of their rights. The petitioner did not meet the threshold of a constitutional petition and should be dismissed with costs.

### **The 2<sup>nd</sup> Respondent's Case**

21. Mr. Wachira presented the 2<sup>nd</sup> respondent's case in opposing the petition. He argued that in an application under Article 40 of the Constitution, particularly on ownership of property, there has to be prima facie evidence of the right to ownership. In the absence of that, the declaratory orders sought cannot be granted.

22. Mr. Wachira submitted further that the issue of public interest had to be borne in mind. The land in dispute is a road reserve which has not been alienated, and the petitioners cannot therefore be granted the orders sought.

23. Mr. Wachira argued further that the petitioners' right to own property should be distinguished with a claim of a right to enjoy the fruits of ownership. The petitioners do not own the suit parcel of land and therefore they are not entitled to the right of user of the property. They were making a claim to ownership of the suit property, and in that event, they should have sought a declaration from the Environment and Land Division that they are the rightful owners of the property. He urged the court to dismiss the petition.

## **Findings**

24. The petitioners claim in this petition violation of their rights under Articles 24, 40, 43 and 47 of the Constitution. They have stated unequivocally that the land in dispute is a road reserve, public land adjacent to land belonging to the Provincial Administration. They have licences to operate businesses on the land in dispute, but confirm that they do not have a proprietary right to the property.

25. They have received notices to vacate the land, but they claim that the notices given to them are not specific and are not reasonable.

26. In the case of *Rashid Odhiambo Alogoh & 245 Others v Haco Industries Ltd Nairobi Civil Appeal No. 110 of 2001 (Unreported)* the Court of Appeal stated that it was the duty of the court to consider the allegations set out in the pleadings and depositions and decide whether they constitute a breach of fundamental rights and freedoms. The question that the court needs to determine in this matter is whether, on the facts set out above, there is any violation of the petitioners' rights under Articles 24, 40, 43 and 47 of the constitution.

### **Has there been a Violation of Article 24?**

27. The Constitution provides under Article 24 that there shall be no limitation of a right or freedom under the Bill of Rights except as provided by law. Article 24 does not therefore guarantee a specific right but only provides for the circumstances and the manner in which a right or fundamental freedom in the Bill of Rights can be limited.

### **Has there been a Violation of Article 40?**

28. 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:

*'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....'*

29. The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licences to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 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. I therefore find and hold that there has been no violation of the petitioner's right to property under Article 40.

### **Has there been a Violation of Article 43?**

30. The petitioners allege that the actions of the respondents have violated or threaten to violate their rights under Article 43 of the constitution. They rely on the decision of Justice Musinga in the case of ***Susan Waithera Kariuki and Others –v- Town Clerk Nairobi City Council and 2 Others Petition No. 66 of 2011***. They claim that the actions of the respondents in requiring them to vacate the land violates their right to housing under Article 43 and that their circumstances are the same as those of the petitioners in the case of ***Susan Waithira and Others (supra)***

31. Article 43(b) guarantees to everyone the right to ***‘accessible and adequate housing, and to reasonable standards of sanitation’***. In the above case, Justice Musinga issued an interlocutory conservatory order to prohibit the eviction of certain families living in various informal settlements in Nairobi. Article 43(b) deals with the right of housing. It does not encompass, in my view, persons in the circumstances of the petitioners in this case who are, in their own words, operating businesses such as garages, hardware and furniture shops and who have invested millions of shillings in their businesses on the road reserve. Indeed, even in the case of those who may be poor residents of informal settlements, the duty of the state may be limited to putting in place policies to ensure access to adequate housing. Article 43 cannot therefore be interpreted to impose a duty on the respondents to provide alternative business premises to business men who can afford to invest millions in their businesses. I find, therefore, in the instant case, no violation of the petitioners’ rights under Article 43 of the constitution.

### **Has there been a Violation of Article 47?**

32. The petitioners allege violation of their rights under Article 47 of the Constitution. They state that though they have been given notices to vacate the land, such notices are not specific or reasonable. They also allege that they wrote to the Ministry of Lands in 2008 regarding the Provincial Administration land adjacent to which they are carrying on business and were not accorded an opportunity to be heard. They therefore claim that their rights under Article 47 have been violated by the respondents.

33. The petitioners concede that they operate on licences granted to them by the 1<sup>st</sup> respondent. It is trite law that a licence conveys no proprietary interest in the property in question, and there can therefore be no violation of the rights protected under Article 40 with regard to the petitioners. All that they are entitled to as licensees is reasonable notice. There is no requirement that they be given any or any specific reason for being required to vacate the land they occupy on a licence.

34. With regard to their claim that they were not given a hearing in 2008 by the Ministry of Lands with regard to the alleged allocation of the Provincial Administration land, there is no connection between their licence to operate on the road reserve and their request to the Ministry to be considered for allocation of the adjacent land. Article 47 guarantees a right to every person to ***‘administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.’*** Subsection 2 provides that ***‘If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.’***

35. As noted above, the petitioners are licensees. As such, they are entitled to the rights that accrue to the holders of licences. There can be no violation of their rights under Article 47 if they have been given reasonable notice to vacate the land, and neither can their rights be deemed to have been violated with regard to land that they have no rights of use or ownership over, as is the case with the Provincial Administration land which they had asked to be considered for allocation.

36. In the circumstances, I find and hold that there has been no violation of the petitioners’ rights under any of the Articles of the Constitution. The petition is therefore dismissed.

37. The petitioners came to seek relief from this court upon receipt of notices from the respondent to vacate the road reserve. They had been given notices of 14 days. While I find that there has been no violation of their rights under the Constitution and cannot therefore grant them the prayers sought in the petition, the court is nevertheless empowered under Article 23 of the Constitution to make such orders as are appropriate in the circumstances.

38. The land in question is a road reserve and the public interest demands that such land should be used for the purpose it is intended and should not be appropriated for private use. The claim of the petitioners that they have operated their businesses on the land for the last ten years cannot outweigh the public interest to have the land revert to the purpose it was intended as a road reserve.

39. However, as business women and men who have been operating businesses on the land for a long time, they merit a much longer period of notice to move from the land and relocate their businesses elsewhere than the 14 days given to them by the respondent. In the current circumstances, I am of the view that a period of **Sixty (60) days** from today affords them adequate time to find alternative accommodation for their businesses and vacate the road reserve so that it can be put to its proper use by the respondents.

40. I therefore issue an order that the petitioners shall vacate the suit land within **Sixty (60) days** from the date hereof failing which the respondents shall be at liberty to enforce their removal.

41. Each party shall bear its own costs of this petition.

**Dated and Delivered at Nairobi this 2<sup>nd</sup> day of March 2012.**

**Mumbi Ngugi**  
**Judge**