



REPUBLIC OF KENYA

High Court at Meru

Petition 8 of 2012

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 40,47 & 50 OF THE CONSTITUTION OF KENYA

BETWEEN

- KIJUKI KIAMBI PAUL KAIGA.....1ST PETITIONER**
- PIUS MUNGAI NGANGA.....2ND PETITIONER**
- JULIUS MUTURI THUMI.....3RD PETITIONER**
- LOYFORD MUGAMBI NGAI.....4TH PETITIONER**
- JOSEPH MWAURA NDEGWA.....5TH PETITIONER**
- JOHN NDEREBA.....6TH PETITIONER**

AND

THE CLERK MERU MUNICIPAL COUNCIL MERU MUNICIPAL COUNCIL....RESPONDENTS

RULING

The Petitioners filed this petition on 16th May,2012 on allegation of contravention of fundamental rights and freedom under Article 40,47,and 50 of the Constitution of Kenya 2010. The petitioners in filing the petition contemporaneously file summons pursuant to Rules 20-21 of the Constitution of Kenya supervisory jurisdiction and protection of fundamental and freedoms of the individual seeking that court do issue preservatory orders restraining the respondent by itself, agents and servants or people acting on its behest from interfering with, closing, harassing and/or in any way from interfering with the running of the business premises belonging to the applicants/petitioners till this petition is heard and determined. The petitioners further sought an order directing the respondent, his agents, servants or anybody acting on its behest to maintain the status quo and that the applicants to continue running their business of scrap metal dealing till further orders of this court.

The grounds in support of the summons are stated on the face of the application. The summons is supported by annexed affidavit of the applicants deponed upon by Kijuki Kiambi. Paul Kaiga, on his behalf and of the other co-petitioners to which affidavit the petitioners have attached several annextures in support. The application is opposed. The respondent swore a replying affidavit in opposition to the

application.

When the summons came up for hearing, this court heard oral submissions by Mr. Nyenyire, learned Advocate holding brief for Mr. Ondari, Advocate for the petitioners, and Mr. Gatari Ringera, learned Advocate for the respondent. This court has carefully considered the submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions.

The issue for determination by this court is whether the petitioners/applicants have laid sufficient basis for this court to grant preservatory orders as sought by the petitioners pending hearing and determination of this petition.

The brief facts of this petition are that in April , 2012 the petitioners approached the respondent to have their annual licenses for year 2012 renewed. The respondents informed the petitioners their licenses shall not be renewed because of two reasons:-(i) that the respondent had decided that business of scrap metal dealing would no longer be allowed within Meru Municipality (ii) that it suspected that the scrap-metal dealers are involved in criminal activities of stealing manhole lids, chamber lids and other implements that the respondent use in covering drainage and serve channels within Meru Municipality. That when petitioners sought audience with the respondent they were informed individually to write to the respondent inter alia stating that they shall no longer be involved in stealing of the merchandize as a condition for the renewal of licenses.

The petitioners declined to do so preferring to file this petition. The respondent in their replying affidavit has annexed copies of minutes dated 22nd March, 2012 in which minutes the respondent decided to stop licensing of scrap business and have contended that the said decision has not been challenged by the petitioners as required by law. The respondent further argues that the decision to grant licenses to the petitioners is not automatic. The petitioner have not denied having been given reason for refusal to renewal of their licenses.

The reasons were given as per petitioner's affidavit under paragraph 6. The petitioners have not denied by way of replying affidavit of the existence of respondent's decision to deny them licenses. They have not sought to have the decision stayed.

The respondent in the instant petition has deponed that it is indeed true that the petitioners have indeed been carrying on scrap metal business within the respondent's area of jurisdiction and that following cases of rampant theft of its property the respondent held various meetings with the petitioners with a view of stemming the vice and it was only after the theft of the respondent's property escalated that the respondent was constrained to making a decision to stop licensing of scrap metal business so as to arrest the situation. The respondent further contends that it has no ill will against the petitioners carrying on with their business.

The matters raised by the respondent are weighty, there is un-denial great public interest in the implementation of the resolution reached by the respondent. That must override private right or interest to halt possible prejudice to the administration of justice. There is a legitimate public expectation that the respondent' decision should be implemented and the same has since march been implemented.

This court take judicial notice of the fact that theft of drains, manholes, materials of various local authorities has been on the rise in the country prompting various local authorities in the country to bar trading of scrap metal within their jurisdictions.

In light of this application it is my humble opinion that this is a proper case in which the rights and fundamental rights of the petitioners ought to be limited as envisaged by Article 24(1) (a-e) of the Constitution of Kenya,2010 which provides:-

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,

including—

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

I therefore find that the rights and fundamental freedoms sought in this application by the petitioners if granted would prejudice the rights and fundamental freedoms of the great majority. I therefore reject the application at this stage with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF NOVEMBER, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open court in presence of:

Mr. Ondari for the petitioner

Mr. G. Ringera for the respondent.

**J. A. MAKAU
JUDGE**