



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 5 OF 2018

IN THE MATTER OF ARTICLES 1, 2, 10, 22, 28, 40, 43, 47, 55, 57 AND 186 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FOURTH SCHEDULE PART 2(7) (A), (B), (C) AND (D) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 10, 28, 40, 43, 47, 55 AND 57 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE STALL/LOCK-UPS AT THE UASIN GISHU COUNTY GOVERNMENT WHOLESALE MARKET

AND

IN THE MATTER OF UNHINDERED ACCESS TO THE MARKET STALLS/LOCK-UPS AT THE UASIN GISHU COUNTY GOVERNMENT WHOLESALE MARKET

BETWEEN

THE ELDORET MARKET TRADERS ASSOCIATION.....PETITIONER

AND

THE UASIN GISHU COUNTY GOVERNMENT.....RESPONDENT

RULING

It is a very cardinal principle in law that litigation must come to an end and that parties who are successful should enjoy the fruits of the judgment without delay. Moreover, that justice shall not be delayed. This principle is enshrined in article 159 of the constitution of Kenya 2010 that provides; -

“159. Judicial authority

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.”

On the 3.8.2018, the parties herein entered into a consent on the following terms;

(1) The completion period for renovation of the Eldoret Wholesale Market as ordered on 29.3.2019 be extended to the 15.9.2018.

(2) Parties to countercheck the lists in the petitioner’s further affidavit sworn on 23.3.2018 and the respondents’ further affidavit sworn on 23.3.2018. In the event of variance to reconcile by agreement in good faith. A meeting to be held on 27.8.2018 and 9.00 a.m. at K.V.D.A. Plaza, Eldoret in the office of the Chief Officer, Trade and Industrialization.

(3) The list be signed by the petitioner and respondent and be submitted to the petitioner’s advocate by 30.8.2018 for filing.

(4) The relocated traders be put back in possession by 30.9.2018.

(5) The costs of the Motion of Kshs. 10,000 be paid by the respondents on or before 10.8.2018. Mention on 22.10.2018.

On the 4th March 2019, this court made a site visit on the suit property and ordered that the traders be allowed back on the premises on or before the 4th March 2019.

The respondent has now come with an application dated 4.4.2019 for a review of the order made on 4.3.2019 and for an order that the re-opening of the market be subject to verification on genuine facts as follows;

(i) By production of original identity card.

(ii) By production of evidence of previous payment receipt by the respondent or proof of ownership of stall.

(iii) By appearing in person for verification.

The respondent prays that the verification provision be undertaken within 7 days. That the verified traders be relocated back to the market. That the Commander, Uasin Gishu County do provide security during the re-opening of the market.

The application is based on grounds that can be discerned from the supporting affidavit of **Abraham Mengich**, wherein he states that the Eldoret Wholesale market renovation and construction has been fully completed. He is aware that the Hon. Court had scheduled the re-opening of the Eldoret Wholesale market for 4th APRIL 2019. He confirms the department of trade and industrialization did launch a physical verification and allocation of stalls for the traders whose names have been lodged in court by both the Petitioner in its further affidavit sworn on 23rd March 2018 and the Respondent further affidavit sworn on 23rd March, 2018 on 27th March 2019 and that all they required from the traders was as hereunder particularized: -

a) Production of original national identity card;

b) Production of evidence of previous payment receipt issued by the Respondent or proof of ownership of stall;

c) Appearance in person before the Respondent with document and material in (a) and (b) above.

He confirms that the verification and allocation of stall exercise was done in good faith to ensure that only genuine traders are relocated back to the Eldoret Wholesalers Market in accordance with the list of traders annexed to the Petitioner's further affidavit sworn on 23rd March 2018 and the Respondent further affidavit sworn on 23rd March 2018.

However, they are facing a serious challenge since a majority of the Petitioner membership have adamantly declined to physically attend the Department of Trade and Industrialization verification of traders and allocation of stall numbers exercise launched on 27th March 2019. They are apprehensive that the list of traders annexed to the Petitioner's further affidavit sworn on 23rd March, 2018 may contain names of deceased persons who previously owned stalls in the market.

He depones that as at now, only a minimum of 100 traders out of the approximately 650 traders whose names have been lodged in court by both the Petitioner in its further affidavit sworn on 23rd March, 2018 and the Respondent further affidavit sworn on 23rd March 2018 have complied with the notice for verification and allocation of stalls notice.

The Respondent is desirous of relocating genuine traders back into the Eldoret Wholesale market and thus in need of this Hon. Court's

assistance.

That without a court annexed verification and allocation exercise being conducted, an injustice may be suffered by a membership of the Petitioner who have gone to their offices complaining that their names were not captured in spite of them having documents. of ownership of stalls.

The Respondent is apprehensive that there shall be breach of peace and destruction of public and private property within Eldoret Town should the verification and allocation of stalls exercise fail to take place within a court annexed process. The Respondent therefore seeks the Honorable Court's assistance and direction compelling the Petitioner leadership to organize its members and compel them to physically attend and participate in the verification and allocation of stalls exercise.

The Respondent has filed this application with the sole intention of seeking Kenya Police and the Hon. Court assistance with the verification, allocation of stalls and re-allocation of the traders back into the Eldoret Wholesalers Market. According to the respondent, the application is necessitated by the need to secure genuine traders are relocated in the Eldoret wholesalers market in the interest of the parties herein. The orders shall not in any way prejudice or cause anyone to suffer prejudice but is in the interest of the public. That the application has been made bonafides.

The respondent has been advised by his Advocates on record which advise he verily believes to be true that the Kenya national Police are tasked with rendering of support to Government agencies in the enforcement of administrative functions and exercise of its lawful duties; preservation of peace, maintenance of law and order, provision of assistance to the public when in need and preservation of peace under the National Police Service at No. 11A of 2011, Laws of Kenya.

In the replying affidavit, Zakayo Maina Kariuki, on behalf of petitioner states that the application is bad in law as it seeks to invoke the Civil Procedure Act, Cap. 21 which are inapplicable to matters brought under the Constitution of Kenya, 2010 which seek to enforce fundamental rights and freedoms. That the respondent has always had a history of flagrant disobedience with the orders of this court in this matter as it is ever unwilling to comply.

He further states that the orders of the court were predicated on no condition as to the return of the members in the list of the petitioner into occupation of the market upon renovation and the respondent was simply to position our members as before. The respondent in clear breach of the order created conditions for the petitioner's members that over alleged indebtedness and placed a public notice that was never the subject of the court order and that the respondent had never raised the issues in the notice before the court and even when recording the consent, they never raised the issues in the notice.

The respondent has no cross — petition for any alleged arrears in this matter.

He believes that that respondent should not be allowed to frustrate the order of the court by hiding behind the cloak of the notice and that no police assistance is necessary as no evidence has been placed before the court of any intended breach of the law by any person. Their members are law abiding citizens but the respondent is seeking to create a situation whereby the actualization of the orders of the court will be an illusory.

According to the petitioners, a consent order binds the parties and cannot be set aside unless the established principles relating to vitiating a contract have been established and which is not the case here. That the respondent is in contempt and the court should not grant any indulgence. That he prays that the application be dismissed with costs and the deponent of the affidavit in support of the application be incarcerated in prison today for being in contempt.

I have considered the application and the response and do find that the same intends to re-open this matter which was settled by consent of the parties. The consent order made on 3rd August 2018 settled this matter and there was no agreement that the Petitioners produce receipts for verification. A consent order can only be varied by another consent or on the following grounds namely: -

- “i. Where the consent was obtained fraudulently***
- ii. In collusion between affected parties***
- iii. Where an agreement is contrary to the policy of the Court***
- iv. Where the consent is based on insufficient material facts***
- v. Where the consent is based on misapprehension or ignorance of material facts***
- vi. Any other sufficient reason.”***

In Flora N. Wasike vs Destimo Wamboko [1988] eKLR, this Court stated:

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983."

In Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons.”

The petitioner and respondents have agreed that the petitioner members to Present themselves for verification with their identity cards and therefore, I do find that the consent entered on 3. 8.2018 has been varied by consent of the parties entered today that the parties to attend verification with their Identity Cards.

On the issue of the receipts, I do find the request for receipts is made in bad faith as it was not an issue when the consent dated 3.8.2018 was entered into. Moreover, both parties have the record of the members of the petitioner.

This matter should be brought to conclusion and the orders of the court should be obeyed without variation. The list of the traders is on court record and therefore the respondents should go by the lists on record.

I do direct that all the 608 members of the petitioner be allocated their stalls in the Eldoret Wholesale market as agreed by consent dated 3.8.2018 on or before the 9.4.2019. The traders to be verified vide their national identity cards. The County Commander, Uasin Gishu to provide security for the relocation exercise. There be liberty to apply. No orders as to costs this petition having been brought in public interest.

Dated and delivered at Eldoret this 5th April, 2019.

A. OMBWAYO

JUDGE